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IN THE

Supreme Court of the United States

CRAFTSMEN LIMOUSINE, INC., AND JRML SALES AND SERVICE, D/B/A CRAFTSMEN LIMOUSINE, INC., A MISSOURI CORPORATION,
Petitioners,

v.

FORD MOTOR COMPANY, A DELAWARE CORPORATION, AND AMERICAN CUSTOM COACHWORKS, A CALIFORNIA CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In September 2002, Petitioners prevailed in a jury trial and obtained judgment against the Respondents on their claim that Respondents participated in an antitrust conspiracy in violation of the Sherman Act. On appeal to the Eighth Circuit Court of Appeals, the circuit court determined there was sufficient evidence for the jury to conclude that Respondents had conspired to restrain trade; however, the Eighth Circuit reversed the district court's application of the *per se* rule, and remanded the case for a new trial based on the rule of reason standard. After the district court entered summary judgment on remand in 2006, the case was appealed a second time to the Eighth Circuit, which upheld summary judgment.

1. The first question presented is whether summary judgment was appropriate in light of Petitioners' adjudged and affirmed proof that Respondents conspired to restrain trade, which should have been acknowledged by the district court as the law of the case on remand, and in light of the Eighth Circuit's recognition that Respondent Ford possessed power in the relevant market.

2. The second question presented is whether, on remand, the burden of proof should have shifted to the Respondents.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Although the case was initially filed against additional party-defendants, those parties were either dismissed from the case, or settled with the Petitioners prior to trial. The parties to the proceeding below from which this *Petition for a Writ of Certiorari* is taken are all named in the caption above. The only parties to the appeal in the Eighth Circuit Court of Appeals were Petitioners and Respondent, Ford Motor Company.

Petitioner, Craftsmen Limousine, Inc., has no parent company and no publicly-held company owns 10% or more of its stock. Robert J. Haswell owns 75% of the corporation. Robert M. Haswell and Lori Haswell, husband and wife, own 25% of the corporation.

Petitioner, JMRL Sales & Service, Inc., has no parent company and no publicly-held company owns 10% or more of its stock. Robert J. Haswell owns 50% of the corporation, and Robert M. Haswell and Lori Haswell each own 25% of the corporation.

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CRAFTSMEN LIMOUSINE, INC., AND JRML SALES AND SERVICE, D/B/A CRAFTSMEN LIMOUSINE, INC., A MISSOURI CORPORATION,
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FORD MOTOR COMPANY, A DELAWARE CORPORATION, AND AMERICAN CUSTOM COACHWORKS, A CALIFORNIA CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 491 F.3d 380, (8th Cir. Mo. 2007), 2007-1 Trade Cases, P 75,748.

The opinion of the United States District Court for the Western District of Missouri is not reported in the Federal Reporter system; however, it may be found at 2005 WL 3263288 (W.D.Mo.), 2005-2 Trade Cases P 75064, 68 Fed. R. Evid. Serv. 1118.

The Order of the United States District Court for the Western District of Missouri denying Petitioners' motion for partial summary judgment based on the law of the case doctrine is unpublished, but may be found at 2005 WL 2321662 (W.D.Mo.).

The opinion of the Eighth Circuit Court of Appeals reversing the judgment in favor of Petitioners and remanding the case for a new trial, *dissenting opinion, rehearing and rehearing en banc denied*, is reported at 363 F.3d 761, 64 Fed. R. Evid. Serv. 454.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on June 19, 2007. No rehearing was sought. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Rule 56(c) of the Federal Rules of Civil Procedure

STATEMENT OF THE CASE

The facts of this case constitute quintessential restraint of trade, and lay bare the misuse and abuse of corporate power. It is a case for which the Sherman Act demands justice, but ironically, represents justice denied by a federal court, even though a jury concluded that the Respondents conspired to restrain trade, a conclusion which was upheld on appeal. Despite the Eighth Circuit's conclusion that there was sufficient evidence for a jury to find a conspiracy in restraint of trade; on appeal the second time, the Eighth Circuit upheld the district court's disposal of the case on a summary judgment motion.

The events which gave rise to Petitioners' cause of action occurred between 1995 and 1998. Bob and Marc Haswell are a father and son who own two companies: Craftsmen Limousine, Inc., which builds limousines, and JRML Sales and Service, doing business as Craftsmen Limousine, which sells, and supplies parts for, limousines. During this period of time, Ford Motor Company and General Motors sold the base units used by limousine manufacturers to build limousines.

The limousine industry is regulated by the National Highway Traffic Safety Administration (NHTSA). Coachbuilders must self-certify that their vehicles meet all federal safety standards. Petitioners' vehicles were inspected by an NHTSA representative, and passed all federal safety standards. In 1990, Ford Motor Company formed the Quality Vehicle Modifier program (QVM) to purportedly assist coachbuilders in converting Ford's base vehicles in compliance with federal safety standards. The QVM program imposed additional coachbuilding restrictions on its participants; *e.g.*, length and weight restrictions, and penalized coachbuilders who did not join the QVM program, but purchased base units from Ford, including voiding the applicable, product warranty. Participation in QVM was voluntary; however, cash incentives were offered to coachbuilders who signed up for the QVM pro-

gram and purchased Ford's base vehicles for conversion. An organization of limousine manufacturers, Limousine Industry Manufacturers' Organization (LIMO) agreed to build their limousines based on Ford's QVM requirements and restrictions. Although not a coachbuilder, Ford was a member of LIMO. Ford required QVM participants to join LIMO.

Petitioners did not enroll in the QVM program, and were prevented from joining LIMO. Petitioners built "specialty limousines" that were longer than the QVM guidelines allowed. Non-QVM coachbuilders, like Petitioners, were excluded from advertising in the limousine industry's trade publications, and excluded from showing their limousines at the industry's trade shows. As a member of LIMO, Ford Motor Company influenced its agenda, and conspired to control which limousines entered the marketplace. Ford and LIMO attempted to force Petitioners to comply with QVM guidelines or get out of the market.

Federal jurisdiction in this matter was original based on 28 U.S.C. § 1331.

REASONS FOR GRANTING THE PETITION

"Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Eastman Kodak Company v. Image Technical Services*, 504 U.S. 451, 466-467, 112 S.Ct. 2072, 2082 (1992), citing *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563, 579, 45 S.Ct. 578, 583, 69 L.Ed. 1093 (1925); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, n. 22, 76 S.Ct. 994, 1007, n. 22, 100 L.Ed. 1264 (1956); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 70, 97 S.Ct. 2549, 2568, 53 L.Ed.2d 568 (1977). Summary judgment is not favored in an antitrust case, particularly when motive and intent are determinative.

Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1963); *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464 (1962).

This is a case that was tried by a jury, reversed on appeal, remanded, and then tried by summary judgment motion. In *Craftsmen Limousine v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004) (*Craftsmen I*), the Eighth Circuit Court of Appeals determined that Petitioners presented ample evidence from which a reasonable jury could find that defendants engaged in a conspiracy in violation of Section 1 of the Sherman Act, and upheld the conclusion of the jury that Respondents engaged in a conspiracy to restrain trade. The evidence submitted to the jury in 2002 was before the trial court in 2005 following remand. The purpose of the remand order was a new trial in which the jury would apply the rule of reason standard to the evidence rather than the *per se* rule.

The United States District Court for the Western District of Missouri, on remand, and the Eighth Circuit Court of Appeals in *Craftsmen II* chose to disregard the evidence presented in the 2002 trial of this action, which resulted in a jury verdict and judgment, and chose to disregard the finding by the Eighth Circuit in *Craftsmen I* that there was ample evidence from which to conclude that Respondents engaged in a conspiracy to restrain trade. The existence of a conspiracy is not only an issue of fact, it is one of law. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). The conspiracy was an adjudicated issue of law in *Craftsmen I*, and should have been the law of the case upon remand.

In *Craftsmen I*, the Eighth Circuit went into a lengthy, detailed discussion on whether Ford's insistence on QVM compliance was arguably rooted in safety concerns, which would remove the conspiracy to restrain trade from a *per se* analysis: "The question is whether Ford's insistence on QVM compliance was arguably rooted in safety concerns, and if so,

whether this should remove the alleged agreement from the *per se* rule's realm. We believe it does." *Craftsmen I* at 774.

The question of motive does not arise absent a showing of market power. *California Dental Association v. F.T.C.*, 526 U.S. 756 (1999). As stated by the Seventh Circuit in *Ball Memorial Hospital v. Mutual Hospital Insurance*, 784 F.2d 1325, 1334-1335 (7th Cir.1986), "Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without power bear no burden of justification." Unless Respondents had a strong showing of market power, the question of whether Ford's motive was based on safety concerns would be irrelevant. Whether Respondents were motivated by safety concerns is a disputed issue of fact, which required a trial by jury. As this Court stated in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 479 (1992), "[W]hen we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment."

On remand, the opinion in *Craftsmen I* should have precluded summary judgment. Respondents' conspiracy to restrain trade was the law of the case, and the Eighth Circuit's conclusion that the jury should have considered the "safety concerns" of Ford Motor Company in conspiring to restrain trade should have resulted in an inference that Respondents possessed market power. Ford Motor Company achieved an amazing feat in convincing the district court to enter summary judgment when there was sufficient evidence of a conspiracy to restrain trade in violation of the Sherman Act plus an inference that Ford Motor Company possessed market power. Even more amazing was the Eighth Circuit's affirmance in *Craftsmen II*.

Rule 56(c), the mechanism for summary judgment under the federal rules, requires an absence of a genuine issue as to any material fact. *Adickes v. Kress*, 398 U.S. 144 (1970).

The rule authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and where no genuine issue remains for trial. The purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

In its motion for summary judgment, Respondents relied on an argument that Petitioners could not prevail at trial without a plenary market analysis, and absurdly used 2005 consumer preference data, which was not available between 1995 and 1998, the years of the antitrust conspiracy in this case, to support its self-serving analysis of the alleged, relevant market. Despite this Court's holding in *California Dental* that antitrust analysis falls within a continuum and requires a flexible approach, and not every case is a candidate for plenary market examination, the district court sustained Respondents' *Daubert* motion, and entered summary judgment, because Petitioners' expert allegedly did not perform a full market analysis. Furthermore, the district court made a factual determination regarding the definition of the relevant product market, which was error, as market definition is a question of fact for the jury. *United States v. E.I. du Pont de Nemours & Co., supra.* The failure of these parties to agree on the definition of the relevant market is a genuine issue of fact which should have mitigated against summary judgment.

Summary judgment in this matter wrongfully denied Petitioners their right to a jury trial, which is a fundamental right in American jurisprudence. *Craftsmen I* remanded the case for a new trial. "No purpose would be served by remanding for a jury trial if there was no material fact issue for the jury to determine." *Pyramid Life Insurance Company v. Curry*, 291 F.2d 411, 413 (8th Cir.1961). The law of the case doctrine is the very principle of ordered jurisdiction by which

the courts administer justice. The doctrine provides a measure of consistency and finality which the parties have a right to rely on. For this reason, a prior decision governs in both the lower courts and in the appellate court itself which rendered such decision upon a subsequent appeal to it upon the same point. *Davis v. J.C. Nichols Co.*, 761 S.W.2d 735 (Mo.App.1988). The failure of the district court and the Eighth Circuit Court of Appeals to follow the law of the case settled in *Craftsmen I*, compounded by additional errors committed on remand, including the grant of summary judgment despite the absence of a genuine issue of material fact, is an egregious denial of Petitioners' right to a jury trial, and should be addressed and corrected by this Highest Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 06-1559

CRAFTSMEN LIMOUSINE, INC.; JMRL SALES & SERVICE, doing business as Craftsmen Limousine, Inc., a Missouri corporation,
Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY, a Delaware corporation,
Defendant-Appellee,

GENERAL MOTORS CORPORATION, a Missouri corporation; CADILLAC, a division or affiliate of General Motors Corporation; LIMO, an association of limousine builders; AHA AUTOMOTIVE DESIGN, a Canadian corporation,
Defendants,

AMERICAN CUSTOM COACHWORKS, a California corporation,
Defendant-Appellee,

CLASSIC LIMOUSINE & ARMOURING, a California corporation; DABRYAN COACH BUILDERS, a Missouri corporation; Eagle Coach, an Ohio corporation; EXECUTIVE COACHBUILDERS, a Missouri corporation; FEDERAL COACH, an Arkansas corporation; IMAGE COACHES, an Indiana corporation; INTERNATIONAL ARMOR & LIMOUSINE, an Illinois corporation; Krystal Koach, a California corporation; LCW, a Texas corporation; PICASSO COACH BUILDER, a New York corporation; ROYALE LIMOUSINE MANUFACTURERS, a Massachusetts corporation; R-D GROUP, a California corporation, doing business as Tiffany

Coachworks; ACCUBUILT, INC., an Ohio corporation, formerly known as S & S/Superior of Ohio; TRI-STATE CUSTOM COACH, a New Jersey corporation; UNITED STATES COACHWORKS, a New York corporation; VIKING COACHWORKS, a Florida corporation,

Defendants.

Submitted: Jan. 11, 2007
Filed: June 19, 2007

Before WOLLMAN and MELLOY, *Circuit Judges*, and NANGLE,[1] *District Judge*.

MELLOY, *Circuit Judge*.

Plaintiff Craftsmen Limousine, Inc. ("Craftsmen") brought an antitrust claim against vehicle manufacturers Ford Motor Company ("Ford") and the General Motors Corporation ("GM"), the Limousine Industry Manufacturers' Organization ("LIMO"), and numerous coachbuilding companies engaged in the business of stretching Ford and GM vehicles into limousines. Over the course of the lawsuit, Craftsmen reached settlements with and/or voluntarily dismissed all defendants except Ford and American Custom Coachworks ("American Coach"), one of the coachbuilding companies. In an initial trial, the district court found that an alleged conspiracy between Ford and American Coach to influence the advertising and trade-show policies of two trade publications constituted a per se antitrust violation, and the jury returned a verdict for Craftsmen.

Ford appealed to this court, and we reversed the judgment. *Craftsmen Limousine Inc. v. Ford Motor Co.* ("*Craftsmen I*"), 363 F.3d 761 (8th Cir.2004). We held that the district court erred in applying a per se rule to the alleged antitrust

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[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

violation; it instead should have applied the rule of reason. We remanded the case and instructed the district court to apply the rule of reason to Craftsmen's antitrust claim.

After further discovery, the district court[2] granted Ford's motion to exclude Craftsmen's expert witness under Federal Rule of Evidence 702 and granted the motions of Ford and American Coach for summary judgment in their favor. Craftsmen now appeals those decisions. We affirm.

I. BACKGROUND

A. Pre-Litigation Background

The factual background is fairly extensive, and we presented it at length in our first opinion in this case. *Craftsmen I*, 363 F.3d at 764-71. We will not reiterate it in full here, but we discuss those facts necessary to understand the nature of the claim at issue. Because the district court granted the defendants' motion for summary judgment in this case, we present the facts in the light most favorable to Craftsmen. *Bathke v. Casey's Gen. Store Inc.*, 64 F.3d 340, 343 (8th Cir. 1995).

Craftsmen is a Missouri corporation engaged in the business of stretching standard base vehicles into limousines and buses. This process involves cutting the base vehicle in two, inserting structural pieces between the two halves of the base vehicle, and welding the parts back together to create a "stretched" limousine. In general, longer structural inserts (and, accordingly, longer stretched limousines) add weight and create greater stress upon the vehicle frame. Craftsmen, however, asserts that its specialized rebuilding process allows for the conversion of base vehicles, including the Ford-manufactured Lincoln Town Car, into very long limousines without sacrificing safety.

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[2] The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

The National Highway Traffic Safety Administration requires coachbuilders to self-certify that their limousines meet federal safety standards and to provide some objective basis for that belief. Federal authorities began investigating the safety of limousines following a well-publicized crash and other incidents in the late 1980s. Ford sought to protect its image and, at the same time, to increase its share of the market for base vehicles. In 1990, while Craftsmen was actively engaged in the business of building stretched limousines, Ford formed a vehicle certification program that provided guidelines for the conversion °fits vehicles into limousines that met national safety standards. Ford would certify a participant in the program as a "Quality Vehicle Modifier" ("QVM") if it abided by Ford guidelines for converting limousines and purchased insurance naming Ford as the insured. The guidelines limited the conversion options of coachbuilders. Among Ford products, coachbuilders could only convert Lincoln Town Cars, and there were limits upon the total weight of the resulting limousines and the length to which they could be stretched (no more than 120 additional inches). Coachbuilders that followed the guidelines gained some assurance that their vehicles met federal standard standards, and they received cash incentives from Ford for their participation in the QVM program. GM adopted a similar but separate program in 1992, the Cadillac Master Coachbuilders ("CMC") program. Coachbuilders who wished to stretch a vehicle in a manner that did not conform to QVM guidelines could retain QVM membership only if they submitted independent test data regarding vehicle safety to Ford. Most coachbuilders, including all of the original defendants in this case, participated in one or both of the QVM and CMC programs.

Craftsmen was one of a minority of American coachbuilding companies that chose not to participate in either program. Many of Craftsmen's conversions at the time resulted in vehicles longer than the limits imposed by the

QVM and CMC programs (hereinafter "specialty limousines"), and joining the QVM program would have required Craftsmen to abandon its practice of building specialty limousines or to seek costly independent safety analysis. In addition, Craftsmen was already using techniques described in the QVM guidelines, and Craftsmen's owners had no reason to believe that the company's converted vehicles were unsafe. A federal inspection of its converted vehicles in the early 1990s resulted only in some minor, federally-mandated safety modifications.

Ford was also a nonvoting member of LIMO, an industry group of coachbuilders that formed in 1989 to pool resources for product testing and to promote consumer confidence in limousines. American Coach was a voting member. Among coachbuilders, LIMO membership was open only to those businesses who participated in the QVM and/or CMC programs; eventually, LIMO amended its bylaws to allow non-participating coachbuilders to join if they submitted independent crash-test data. Craftsmen did not join either program or perform independent crash tests, and therefore it was ineligible to become a member of LIMO.

Ford, American Coach, and other LIMO members soon began to act through the organization to exert influence over marketing outlets in the limousine industry. In 1995, LIMO received a commitment from one trade publication to remove all non-QVM and non-CMC advertisers and to deny non-QVM and non-CMC coachbuilders access to its trade show. In a 1996 LIMO teleconference, its members unanimously agreed that they would "not endorse or participate in any publication which continues to promote non-CMC/QVM limousine manufacturers" or "any limousine trade show which promotes the interests of non-CMC/QVM products." By 1996, both of the major trade publications in the limousine industry had adopted restrictive policies that barred coachbuilders that did not participate in the QVM or CMC

programs from placing advertisements unless they submitted independent crash-test data to prove that their vehicles complied with federal safety standards. Non-participating coachbuilders also faced restrictions upon their participation in the publications' annual trade shows. In the face of these limitations, Craftsmen's business suffered. It found creative ways to market its company name, such as promoting its ability to customize buses and stretch sport-utility vehicles (neither of these services were subject to advertising restrictions). Craftsmen also maintained a company Web site for marketing purposes, and Craftsmen was able to remain profitable in 1995 and 1996. In 1997-the first year since at least 1991 in which Craftsmen did not turn a profit-Craftsmen began to advertise in a new trade publication that did not require proof of certification or QVM/CMC participation. Craftsmen's expert concedes that, by some point in 1998, any adverse impact of the advertising ban upon Craftsmen's business had evaporated. The same year. Craftsmen filed suit against Ford, American Coach, and several other defendants in the United States District Court for the Western District of Missouri. Craftsmen alleged, inter alia, that the defendants engaged in a conspiracy in restraint of trade in violation of federal antitrust law, 15 U.S.C. § 1, and that this conspiracy harmed Craftsmen's business from 1995 to 1998.

B. Trial, First Appeal, and *Craftsmen I*

Craftsmen's claims against Ford and American Coach proceeded to a jury trial in 2002. The jury returned a verdict of favor of Craftsmen for more than $2 million in damages, which the district court tripled pursuant to 15 U.S.C. § 15(a). Ford and American Coach appealed to this court, arguing that the evidence was insufficient to establish a conspiracy among them, *Craftsmen I*, 363 F.3d at 771, and that the district court erred in finding that the alleged restraint of trade constituted a per se antitrust violation. *Id.* at 772. We disagreed with the first contention and held that Craftsmen submitted evidence

sufficient for a reasonable jury to conclude that Ford and American Coach acted through LIMO to exclude Craftsmen and other specialty coachbuilders from advertising in trade publications and participating in trade shows. *Id.*

We agreed with Ford and American Coach, however, that these actions did not amount to a per se violation of antitrust law. *Id.* at 772-76. We came to this conclusion because restrictions upon coachbuilders that had not submitted particular evidence that their products met certain safety standards are not necessarily anti-competitive: "[T]he creation and enforcement of standards, including safety standards, often has pro-competitive effects. For example, having unsafe limousines in the market could tend to undercut consumer confidence in all limousines, and thereby decrease overall limousine sales." *Id.* at 774. In short, we found that "the economic impact of safety standards is not immediately discernable." *Id.* Therefore, the case demanded a more thorough analysis than the abbreviated one employed by the district court to determine whether the restraint was unreasonable. *Id.*

We held that the district court should have instead applied the rule of reason to determine whether the actions of Ford and American Coach unreasonably restrained trade in the industry. *Id.* at 776. Under the rule of reason, the factfmder probes more deeply into the relevant circumstances to determine whether the actions at issue created an unreasonable restraint on competition. *Id.* at 772-73. Because this question was never posed to the jury, we remanded the case to the district court. *Id.* a 777. We also ruled that the testimony of Craftsmen's expert, David Cole, was inadmissible insofar as it purported to prove an antitrust violation or measure damages arising out of assumed anti-competitive conduct. *Id.* While Cole was qualified and provided expert testimony with regard to Craftsmen's damages, his testimony was not helpful to a jury in a rule-of-reason case because he "*assumed* that

Craftsmen's alleged lost growth from 1995 through 1998 was caused by [the] defendants' alleged conspiracy. He did not determine whether other factors . . . may have affected Craftsmen's growth rate. Under the rule of reason analysis, which should have been applied in this case, such an analysis was required." *Id.*

C. Post-Remand Proceedings

Upon its return to the district court, Craftsmen retained economist John Scoggins to perform expert analysis consistent with our opinion in *Craftsmen I*. To carry out this task, Scoggins used statistical models to show what the demand for Craftsmen limousines should have been during the years at issue and noted that the actual demand was significantly smaller. He identified several variables that could have caused the reduced demand, such as the national economy or competition from other coachbuilders. After running regressions to determine the impact of these variables, he found that none could account for Craftsmen's disappointing sales figures from 1995 to 1998. Therefore, by process of elimination, he concluded that the advertising and trade-show restrictions must have been the primary cause of the dampened demand for Craftsmen's services during that period. Through the use ofa dummy variable to gauge this impact, he was able to estimate the total amount of sales that Craftsmen lost as a result of the restrictions.

Craftsmen merely asked Scoggins to analyze the impact of the behavior of Ford and American Coach upon Craftsmen's net income from 1995 to 1998, and to specifically look into alternative causes for disappointing sales for Craftsmen during the years in question. He performed that task, and went no further. He did not explore whether the restraints had or could have an anti-competitive impact upon the limousine industry as a whole. He did, however, undertake some research into the limousine industry as a whole insofar as it related to Craftsmen's damages, and he found that the number

of competitors in the industry had not changed significantly over a thirteen-year period. He also acquired limited, anecdotal evidence of the adverse impact of the advertising and trade-show restrictions upon the sales figures of one other specialty limousine manufacturer during the same time period.

Ford moved to exclude Scoggins's testimony under *Federal Rule of Evidence 702*, and both Ford and American Coach moved for summary judgment. The district court granted the motions. It concluded that Scoggins's opinion would not "assist the trier of fact to understand the evidence or to determine a fact in issue," Fed.R.Evid. 702, because Scoggins did not analyze whether the restraints at issue were anti-competitive under the rule of reason; he merely analyzed their effect upon Craftsmen. Further, the district court took issue with Scoggins's definition of the relevant market. Scoggins claimed that he analyzed the effects of the allegedly anti-competitive behavior upon the "specialty limousine market"—that is, a market for limousines stretched beyond QVM and CMC limits. He acknowledged that QVM-and CMC-compliant limousines and specialty limousines are substitute products and manufacturers of each type "do compete at some level," but he asserted that they are not "close substitutes." Scoggins offered no empirical support for this market definition. Therefore, the district court found his testimony inadmissible under Rule 702.

The district court also noted that Craftsmen's opposition to summary judgment depended upon the admissibility of Scoggins's testimony. It therefore granted the motions of Ford and American Coach for summary judgment in the case.

II. DISCUSSION

Craftsmen appeals, arguing that the district court erred in excluding Scoggins's opinion under Rule 702 and in granting summary judgment in favor of Ford and American Coach.

The issues are closely related, and we need not address them both. The reasons for the district court's determination that Scoggins's opinion would not assist the trier of fact, if valid, would be the same reasons that his opinion cannot save Craftsmen from an adverse summary judgment ruling in this case. Therefore, we review the question of whether summary judgment was appropriate in light of the record as a whole, including Scoggins's opinion.

A. General Principles of Law

We review a grant of summary judgment de novo, viewing the record in the light most favorable to the non-movant. *Bathke*, 64 F.3d at 343. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To avoid summary judgment, a non-moving party must allege specific facts supported by evidence sufficient to allow a reasonable jury to return a verdict in its favor; a mere "scintilla of evidence" will not suffice. *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995).

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. The Supreme Court has long accepted that Congress did not intend a literal interpretation of that language, and it has read the law as prohibiting only those practices that "impose[ ] an unreasonable restraint on competition." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-43, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). The burden of proving the unreasonableness of a restraint lies with the plaintiff. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 374 n.5, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), *overruled on other grounds by Continental T.V., Inc.v. GTE Sylvania Inc.*, 433 U.S. 36 58-59, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Paschall v. Kansas City Star Co.*, 727

F.2d 692, 701-02 (8th Cir.1984); *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir.1976).

Some antitrust plaintiffs face a lighter burden than others, depending upon the nature of the restraint at issue. Plaintiffs challenging restraints subject to the "per se rule" enjoy the lightest burden of proving unreasonableness. Judicial experience has proven certain types of restraints to be so strongly linked with anti-competitive activity, and their economic impact so immediately obvious, that we presume unreasonableness and deem them unlawful restraints of trade *per se*. *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984)). When challenging such naked restraints, the plaintiff meets its burden of proving the unreasonableness of the restraint merely by proving the existence and substance of the restraint itself. S*ee Nat'l Soc. of Prof. Eng'rs v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) ("In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality-they are 'illegal *per se*.'"). The district court applied this approach to the advertising restrictions at issue here prior to our opinion in *Craftsmen I*.

In a limited number of other cases, the restraint appears pernicious enough on its face to fall within the category of restraints that are unlawful *per se*, but judicial inexperience with the particular type of restraint warrants a "quick look" at the relevant market and the defendant's alleged justifications for imposing the restraint. *Craftsmen I*, 363 F.3d at 773; *see also Calif. Dental Ass'n v. FTC*, 526 U.S. 756, 769-71, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) (acknowledging the existence of the "quick look" mode of analysis). This amounts to an abbreviated analysis of whether the restraint

was unreasonable (though not as abbreviated as an outright condemnation of the restraint as unlawful *per se*).

These two standards are exceptional, however, and their application is reserved for the most patently anticompetitive restraints. Given the danger of applying those truncated modes of analysis too freely, *State Oil Co.*, 522 U.S. at 18, 118 S.Ct. 275, "most antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id.* at 10, 118 S.Ct. 275.

Due to the number of variables involved, including the type of restraint, the nature of the market at issue, and the level of judicial experience with a particular type of restraint in any given case, determining which mode of analysis is appropriate rarely allows for the mechanical application of precedent:

> [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an [appropriate inquiry given the facts of] the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Calif. Dental Ass'n, 526 U.S. at 780-81, 119 S.Ct. 1604.

B. The Scope of *Craftsmen I*

In *Craftsmen I*, we held that the district court erred in applying a per se mode of analysis to the restraint at issue in this case. We noted that the restraint appeared to be an attempt to alter the competitive field in the limousine industry: "[i]n essence, defendants' alleged restraint was an attempt to force Craftsmen to either comply with QVM guidelines or stop selling limousines." *Craftsmen I*, 363 F.3d at 774. We also found, however, that the defendants' plausible safety justifications for pursuing the restrictive advertising standards could have procompetitive effects and therefore an abbreviated analysis of its anticompetitive impact was inappropriate. *Id.* at 776. This decision followed a line of recent Supreme Court precedent holding either the per se or "quick look" modes of analysis improper when the alleged substance of the restraint and any purported justifications for it did not create the obvious impression that the restraint would be unreasonably anticompetitive. *See, e.g., Calif. Dental Ass'n*, 526 U.S. at 7781, 119 S.Ct. 1604; *State Oil Co.*, 522 U.S. at 19, 21-22, 118 S.Ct. 275. Under that reasoning, we held in *Craftsmen I* that the experience of the market and the type of restraint at issue in this case were not so clearly anticompetitive that the district court could properly substitute an abbreviated analysis "in place of a more sedulous one." *Calif. Dental Ass'n*, 526 U.S. at 781, 119 S.Ct. 1604.

Therefore, on remand, Craftsmen had the burden of proving the unreasonableness of the restraint given "a variety of factors" under the rule of reason, *State Oil Co.*, 522 U.S. at 10, 118 S.Ct. 275 it would not enjoy a presumption of unreasonableness based solely upon the existence of the restraint itself. This burden begins with the task of properly defining the relevant market. *Double D Spotting Serv. Inc., v. Supervalu, Inc.*, 136 F.3d 554, 560 (8th Cir.1998). The plaintiff must define both the relevant product market, which

includes "all reasonably interchangeable products," and the relevant geographic market, which consists of the "area in which consumers can practically seek alternative sources of the product." *Id.* After properly defining the market, the rule of reason also requires the plaintiff to show that the restraint has "detrimental effects" upon the competitiveness of the market. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) (quotation omitted).

A plaintiff may satisfy the "detrimental effects" element of its burden in one of two ways. First, a plaintiff may put forth evidence of "actual, sustained adverse effects on competition" in the relevant market. *Id.* at 461, 106 S.Ct. 2009. If the plaintiff cannot submit such evidence, it is relegated to the more challenging course of proving detrimental effects on competition by making "an inquiry into market power and market structure designed to assess the [restraint]'s actual effect." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). A defendant or cartel of defendants has market power if it has the ability "'to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.'" *Midwestern Machine Co. v. N.W. Airlines, Inc.*, 392 F.3d 265, 274 (8th Cir.2004) (quoting William A. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981).

Only after satisfying the above requirements does the burden shift to the defendant to "justify its conduct by reference to rational, procompetitive economic principles." *Flegel v. Christian Hosp., Ne.-Nw.*, 4 F.3d 682, 688 & n.4 (8th Cir.1993) (quotation omitted). If the defendant can do so, the burden returns to the plaintiff to show that the defendant can achieve the same rational, procompetitive ends through means less likely to harm overall competition in the market. *Id.* at 688. If so, the court will ultimately balance "'the harms and benefits to determine if the behavior is reasonable'" on

the whole. *Id.* (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir.1991)).

Contrary to Craftsmen's assertions on the present appeal, none of the elements of this burden were addressed or decided in *Craftsmen I.* Indeed, we could not have decided them, because Craftsmen's case had never gone before a factfmder charged with deciding the dispute under the rule of reason approach. *Craftsmen I* did discuss the procompetitive justifications of Ford and American Coach, but only insofar as they related to the question of which analysis to apply to the case: per se, "quick look," or rule of reason. We did not purport to actually apply the proper approach (the rule of reason), and we did not address the procompetitive justifications in that context.

C. The Propriety of Summary Judgment on Remand

For the following reasons, we hold that Craftsmen failed to produce evidence sufficient to allow a reasonable jury to conclude that it satisfied its burden of proof as defined above. Therefore, the district court did not err in granting summary judgment to Ford and American Coach.

1. Market Definition

The parties do not appear to dispute the relevant geographic market in this case, but they contest the relevant product market. Ford and American Coach claim that the relevant product market consists of the market for limousines generally, while Craftsmen argues for the existence and relevance of a smaller sub-market for longer specialty limousines. The district court found Craftsmen's definition unavailing, and so do we. Craftsmen's attempt to define the relevant product market as the "specialty limousine market" lacks any evidentiary support aside from Scoggins's bald assertions and is inconsistent with Craftsmen's overall claim. As such, no reasonable juror could find that the specialty

limousine market is the relevant product market for this antitrust claim.

Craftsmen defines the specialty limousine market as the market for limousines stretched longer than QVM standards (120 inches) or CMC standards (130 inches) during the time frame at issue. Under that definition, a Lincoln Town Car stretched by 85 inches competes in the same product market as one stretched by 120 inches, while a Town Car stretched by 120 inches competes in a separate market from one stretched by 121 inches. Further, a Town Car stretched by 85 inches would compete in the same market as a Cadillac DeVille stretched by 130 inches, while a Town Car stretched by 125 inches would compete in a separate market than a DeVille stretched by the exact same length. Any reasonable juror would find it implausible that consumers would make such arbitrary and illogical distinctions when buying limousines, and Craftsmen presented no evidence that consumers act in such a manner. Put simply, no reasonable juror could find that Town Cars stretched by 120 and 121 inches, respectively, were not "reasonably interchangeable products," *Double D Spotting Serv., Inc.*, 136 F.3d at 560, particularly given that Craftsmen maintains that Town Cars stretched by 120 and 85 inches are reasonably interchangeable.

Even if Craftsmen had sufficient evidence to support such an apparently arbitrary definition of the product market, we note that it would ultimately undermine Craftsmen's claim. The restrictions at issue arguably aided QVM and CMC members to the general detriment of Craftsmen and all other specialty limousine builders. Assuming those facts to be true, the restrictions certainly harmed some of the competitors within the specialty limousine market. There is no evidence, however, that the restrictions harmed competition within that market. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998) (stating that when the rule of reason applies, a plaintiff "must allege and

prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself"). From the record, it does not appear that the restrictions gave any particular competitor or cartel of competitors within the specialty limousine industry the power to profitably raise prices above or restrict output below a competitive level. To the extent they did, Craftsmen was a likely beneficiary of any anti-competitive environment within the specialty limousine industry; the restrictions may have discouraged upstart coachbuilders from engaging in the process of building specialty limousines and clearly barred QVM and CMC members from serving that allegedly separate market. Thus, the restrictions insulated well-established coachbuilders like Craftsmen from competition in the specialty limousine market. In short, if the restrictions created the risk of an anti-competitive environment *within* some discrete market for specialty limousines, that risk did not stand to harm Craftsmen. Indeed, under the market definition Craftsmen proposes, Craftsmen would have been the beneficiary-not the victim-of reduced competition and artificially high prices within that market.

2. Detrimental Effects

Even though we hold that no reasonable jury could find that Craftsmen properly defined the market as the "specialty limousine market," Craftsmen contends that it presented sufficient evidence of an antitrust violation to avoid summary judgment regardless of whether the relevant product market is defined as the market for specialty limousines or the market for limousines generally. Therefore, we proceed to examine whether Craftsmen presented evidence sufficient for a jury to find detrimental effects on competition in the correct product market-the market for limousines generally.

We first look to whether Craftsmen submitted evidence of "actual, sustained adverse effects on competition" in the general market for limousines. *Ind. Fed'n of Dentists*, 476 U.S. at 461, 106 S.Ct. 2009. Craftsmen points to no evidence

that such effects occurred in the limousine industry as a result of the restrictions. Craftsmen did not show an increase in limousine prices above the competitive level during that time period, nor a decrease in the total number of competitors, nor a reduction in overall limousine output, nor some other economic indicator that the coachbuilding industry as a whole suffered anticompetitive consequences due to the advertising restrictions. The mere fact that the restrictions may have reduced demand for specialty limousines relative to their shorter counterparts does not, without more, show an actual, sustained adverse effect on competition in the market as a whole. Any action that a profit-seeking business takes could increase its market share relative to some other segment of that market; indeed, most rational businesses actively take such steps at every available opportunity. Such steps impact competitors, but that alone does not prove an adverse impact upon the competitive process.

There may have been other conceivable avenues of proving detrimental effects upon the competitive process in this case. For example, Craftsmen may have been able to show that the restrictions stifled industry research and development by effectively forcing innovative coachbuilders to perform costly independent safety testing of vehicles that did not comply with QVM or CMC guidelines. If Craftsmen offered more than a scintilla of evidence that the restrictions were so detrimental to the survival of non-QVM/CMC participants and independent testing so cost-prohibitive that the defendants created an artificial and illegitimately high barrier to competition by means of innovation, then Craftsmen's case might survive summary judgment. Cf. *Allied Tube & Conduit Corp. v. Indian Head. Inc.*, 486 U.S. 492, 495-98, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (describing a jury verdict for the plaintiff on facts similar to those hypothesized above); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961) (per curiam) (reversing the dismissal of the plaintiffs antitrust

claim based upon allegations that the defendants refused to offer their seal of approval for the plaintiffs product and effectively forced it from the market for anticompetitive reasons). Craftsmen does not direct our attention to any such evidence, and facts that do appear in the record would not permit a reasonable jury to find that the advertising restraints had "actual, sustained adverse effects on competition" of the type hypothesized above. *Ind. Fed'n of Dentists*, 476 U.S. at 461, 106 S.Ct. 2009.

Because Craftsmen cannot directly prove actual adverse effects on competition during the years at issue, we turn to the question of whether it has presented evidence to prove those effects indirectly through "an inquiry into market power and market structure." *Copperweld Corp.*, 467 U.S. at 768, 104 S.Ct. 2731. We find that Craftsmen did not submit evidence sufficient to satisfy its burden of proof under this alternative means of proving the detrimental, anticompetitive effects of the advertising restrictions, and therefore it cannot avoid summary judgment.

First, it is clear that Ford and American Coach, acting independently, do not wield power in the limousine market; that is, neither one has the ability "to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." *Midwestern Mach. Co.*, 392 F.3d at 274 (quotation omitted). Ford sells motor vehicles, a tiny percentage of which are converted into limousines (as are a tiny percentage of vehicles sold by other car manufacturers). It does not sell limousines, and therefore it can individually affect the competitiveness of the limousine market only by unilaterally raising the prices of its pre-conversion vehicles or by entering into an agreement to sell a certain line of vehicles solely to a certain coachbuilder, thus making that coachbuilder the exclusive dealer of limousines converted from that particular base vehicle. The common-sense realities of the market show

that Ford lacks the ability to profitably take either step. If Ford were to raise the prices of its motor vehicles generally above competitive levels, it would lose sales to competitors in the much larger market for off-the-lot vehicles, as well as the market for base vehicles to be converted into limousines. Ford also lacks the ability to profitably sell an existing line of vehicles exclusively to a particular coachbuilder, even if it made those sales at a price far above the competitive level. According to Scoggins, there were only 2,250 limousine conversions of any vehicle make in the United States in 1994. If Ford were, for example, to make its Lincoln Town Cars unavailable to the public and sell them exclusively to one coachbuilder, the loss in profits from sales to individuals and other businesses would obviously outweigh the marginal profits of making and selling far fewer Town Cars at a higher price. Craftsmen presents no evidence to contradict these apparent realities of the market.

American Coach does compete in the limousine industry, but the record reveals that it by no means dominates that market. It is merely one of many competitors engaged in the business of coachbuilding, and therefore any attempt to unilaterally increase its prices above competitive levels would be thwarted by consumer flight to American Coach's competitors.

Because neither Ford nor American Coach has the ability to wield market power on their own, we must assume that Craftsmen's theory of the case depends upon the concerted actions of Ford, GM, and the members of their QVM and CMC programs, including American Coach. Acting together, these businesses could conceivably exercise market power in the industry. If a broad cartel of QVM and CMC members agreed to collectively raise prices above competitive levels, the action could be profitable due in large part to advertising restrictions that would have made it more difficult for consumers to learn about competitively-priced alternatives to

doing business with cartel members. In other words, through price-fixing and cutting off the means for non-members to compete effectively, the cartel could collectively act as a monopoly within the coachbuilding industry.

This theory, if proven, could support a finding of market power and an antitrust violation in this case. On the record before us, however, no reasonable jury could find such market power, particularly given the structure of the limousine market. Craftsmen's only evidence of market power is the fact that Ford, GM, and several QVM and CMC coachbuilders acted collectively through LIMO to pressure trade publications into restricting marketing opportunities for coachbuilders who did not belong to the QVM or CMC programs and did not perform independent crash testing. This proven ability to act collectively to exercise influence over trade publication advertising policies does not demonstrate an ability to act collectively "to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." *Midwestern Mach. Co.*, 392 F.3d at 274 (quotation omitted). We noted in *Craftsmen I* that Craftsmen had presented sufficient evidence to prove an agreement among the defendants to set advertising standards; it had not proven that such an agreement was unreasonably anticompetitive. We did not find that the agreement at issue, without more, was sufficient evidence of market power, and we do not make that finding now. We note that demanding certain standards for advertising that exclude some competitors may make the exercise of market power more feasible, but such acts do not alone prove the possession of market power.

Craftsmen did not fill this evidentiary void on remand. The record offers no other evidence to show that these coachbuilders formed a cartel with the ability to collectively exercise market power. For example, there is no evidence that these coachbuilders exchanged price or output information or

took some other step that would facilitate price-fixing among them. There is also no evidence that the structure of the coachbuilding market would allow for a well-disciplined cartel. Indeed, the record suggests that the market consists of a large number of small coachbuilding firms who engage in individually negotiated sales for customized products, facts that make the detection and punishment of firms that "cheat" on any price-fixing agreement difficult if not impossible. There appear to be low costs to entry into and exit from the market, and the minimum efficient scale within the industry appears to be fairly small; both facts weigh against the sustainability of any anticompetitive cartel because its membership would necessarily consist of a large number of firms who would face new and frequent price competition from upstart firms. For example, a small-scale cartel member selling vehicles to livery operators in St. Louis and Kansas City above the competitive price (per an agreement with the cartel) would be hard-pressed to remain faithful to that agreement if a new, non-cartel firm took advantage of the ease of entry into the limousine market and began marketing directly to those same livery operators through personal visits, phone calls, mailings, or advertisements in sources other than trade shows or the two major trade publications. Multiply this likely scenario many times over for the numerous small-scale firms in the industry, and it becomes clear that the structure of the limousine market during the years at issue in this case made the attainment and exercise of market power nearly impossible.

Finally, even if Craftsmen could show the feasibility of such a cartel that would have market power, Craftsmen has identified no motive for Ford to engage in such a conspiracy. Ford makes motor vehicles; it does not convert them into limousines. Any anticompetitive agreement among coachbuilders would likely reduce output in the limousine industry and therefore hurt Ford's sales of base vehicles without any apparent benefits to Ford. In sum, Craftsmen simply has not

submitted sufficient evidence ofthe existence ofsome entity-whether an individual defendant or the defendants acting as a cartel-with the means to exercise market power in the limousine industry.

III. CONCLUSION

As we noted in *Craftsmen I*, the advertising restrictions in this case may be legitimately procompetitive insofar as they protect both consumers and the public image of the limousine market generally. *Craftsmen I*, 363 F.3d at 774-75. Thus, the restrictions could promote consumer confidence in the industry as a whole, as well as avoid a situation in which the entire market for limousines-safe and unsafe alike-would be dampened due to an accident involving a limousine made by a single coachbuilder that did not adequately test the safety of its vehicles.

At the same time, the circumstances surrounding the adoption of the restrictions in this case are somewhat troubling, and we wish to make clear that our decision today does not foreclose plaintiffs from succeeding in antitrust suits for similar restrictions in future cases. LIMO members may very well have had anticompetitive motives in mind when they sought the restrictions at issue here, and those restrictions may have had some detrimental effects upon competition in the limousine industry. Craftsmen simply did not offer proof sufficient for a reasonable jury to make such a finding. Therefore, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MISSOURI
SOUTHERN DIVISION

No. 98-3454-CV-S-DW

CRAFTSMEN LIMOUSINE, INC., *et al.*,
Plaintiffs,

v.

FORD MOTOR COMPANY, *et al.*,
Defendants.

Dec. 1, 2005

ORDER

WHIPPLE, J.

Before the Court are Ford's motion to strike the affidavit of Craftsmen's expert John Scoggins (Doc. 745), Ford's motion to exclude the testimony of Craftsmen's expert John Scoggins (Doc. 748), Ford's motion for summary judgment (Doc. 727), and American Custom Coachworks' motion for summary judgment (Doc. 735). After careful consideration of the facts and law-particularly the appellate decision remanding this case for a new trial-the Court grants all four motions.

I. BACKGROUND

Limousine manufacturers, Craftsmen Limousine, Inc. and JMRL Sales & Service, Inc. (collectively, "Craftsmen") sued several other limousine manufacturers and Ford for antitrust violations under section 1 of the Sherman Act. *See* 15 U.S.C. § 1.[1] Craftsmen alleged that the defendants conspired to pre-

[1] Craftsmen also sues under Mo.Rev.Stat. § 416.031(1). Under Missouri law, Craftsmen's state antitrust claims must be construed in harmony with

vent it from advertising in the limousine industry's two trade publications, and from attending trade shows.[2] The case was tried to a jury in 2002. After the magistrate judge ruled that the alleged restraint was a "per se" antitrust violation, the jury returned a verdict for Craftsmen. Holding that a "per se" analysis was improper, the Court of Appeals for the Eighth Circuit reversed in part and remanded for a new trial. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir.2004). Instead, the case must be analyzed under the "rule of reason," where "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id.* at 772-73 (8th Cir.2004).

The Court of Appeals also held that, on remand, Craftsmen's expert testimony would not be admissible under Federal Rule of Evidence 702:

> Cole's testimony did not sufficiently aid the jury in determining whether there was an "unreasonable" restraint on trade in violation of the Sherman Act. Cole assumed that Craftsmen's alleged lost growth from 1995 through 1998 was caused by defendants' alleged conspiracy. He did not determine whether other factors, including the emergence of two direct competitors, may have affected Craftsmen's growth rate. . . . Because Cole's expert

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comparable federal claims. *See* Mo.Rev.Stat. § 416.141. Summary judgment on the federal claims mandates judgment on the state claims. *See Alphae Shoe Serv. v. Fleming Cos.*, 849 F.2d 352, 353 (8th Cir.), *cert. denied*, 488 U.S. 942, 109 S.Ct. 367, 102 L.Ed.2d 356 (1988).

[2] The factual background of this case is presented at length in *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 763-71 (8th Cir. 2004), and is not repeated here.

> opinion failed to "incorporate all aspects of the economic reality," it should not have been admitted.

Craftsmen, 363 F.3d at 777 (citation omitted). On remand, Craftsmen hired expert John Scoggins to formulate a new opinion.

After discovery, Ford moved for summary judgment, arguing that Craftsmen ignored the Eighth Circuit's mandate. It asserts that Scoggins never analyzed whether the alleged restraints were unlawful, as required by the rule of reason. Opposing summary judgment, Craftsmen submits an affidavit from Scoggins. Ford moves to strike Scoggins's affidavit, arguing it is an attempt to create a "sham" issue of fact to avoid summary judgment. Ford also moves to exclude Scoggins from testifying under Federal Rule of Evidence 702, contending he cannot formulate an admissible rule-of-reason opinion. On October 28, 2005, this Court held a Daubert hearing on Ford's motion to exclude Scoggins's testimony. John Scoggins testified, with examination by Craftsmen's counsel, Ford's counsel, and the Court. The Court also heard oral argument on Ford's motion to strike Scoggins's affidavit.

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The facts and inferences from those facts are viewed in the light most favorable to the nonmoving party. *See* Fed.R.Civ.P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-90, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The moving party must carry the burden of establishing both the

absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. *See id.* The applicable substantive law identifies which facts are material. *See Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine material issue exists when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *See id.* at 249-50.

When the nonmovant has the burden of proof at trial, the movant may carry its burden at summary judgment by demonstrating the absence of an essential element of the nonmovant's claim. *See Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the nonmoving party's claim. *See id.; Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce "specific facts showing that there is a genuine issue fortrial." Fed.R.Civ.P. 56(e); *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1021 (8th Cir.), *cert. denied*, 522 U.S. 816, 118 S.Ct. 64, 139 L.Ed.2d 26 (1997). "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. Thus, summary judgment is appropriate in cases where the party bearing the burden of proof at trial has not presented any admissible evidence on an essential element of her claim. *See, e.g., Sorensen v. Shaklee Corp.*, 31 F.3d 638, 650-51 (8th Cir. 1994) (affirming summary judgment where plaintiff's only causation evidence was held inadmissible under Rule 702).

III. Section 1 Law: The Rule of Reason

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several

States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. "Despite its broad language, Section 1 has long been interpreted to outlaw only those restraints that are 'unreasonable.'" *Craftsmen*, 363 F.3d at 772. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

Under the rule of reason-which controls here-"the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Craftsmen*, 363 F.3d at 772. A rule of reason analysis focuses on the alleged restraint's effect on competition, not on harm to an individual plaintiff. *See Nat'l Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found.*, 64 F.3d 1130, 1135 (8th Cir.1995) ("The Associations' claims of harm to the market reflect mere individual harm."), *cert. denied*, 517 U.S. 1189, 116 S.Ct. 1676, 134 L.Ed.2d 779 (1996); *see also T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 635 (9th Cir.1987) (party cannot withstand summary judgment motion in absence of evidence of harm to competition). Thus, if a claim "does no more than state plaintiff's commercial disappointment" at losing business, it "is insufficient as a matter of law to rise to the level of an antitrust violation within a relevant market." *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 561 (8th Cir.1998); *see also Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682, 689 n. 6 (8th Cir.1993) ("A jury could not reasonably find based on these affidavits that the denial of privileges to Flegel and Still by Christian has caused actual detrimental effects to competition (to Flegel and Still, perhaps, but not to competition)."); *cf. Dial A Car, Inc. v.*

Transp., Inc., 82 F.3d 484, 486-87 (D.C.Cir.1996) ("While Dial a Car alleges injury to itself, that injury involves only one specific competitor and is insufficient to support a finding that the market as a whole is or will be injured.").

"Injury to competition requires proof either of market power in a relevant market, or of an actual adverse effect on competition." *Brookins*, 219 F.3d at 852 (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986); *see also Flegel*, 4 F.3d at 688. "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for actual adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." *Indiana Fed'n of Dentists*, 476 U.S. at 460-61 (internal quotations omitted); *see also Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655, 662 (8th Cir.2000) ("[P]laintiffs have failed to prove actual adverse effects on competition in that market, such as increased prices for anesthesia services, or a decline in either the quality or quantity of such services available to surgery patients."). Isolated statements of consumer preference "are not a sufficient 'empirical demonstration concerning the [adverse] effect of the [defendants'] arrangement on price or quality,' to state a § 1 claim." *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 128 (2d Cir. 1995) (alterations in original) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 n. 49, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984)).

Absent evidence of actual adverse effects on competition, a plaintiff may establish harm to competition by defining the relevant market and offering proof that the defendant has market power in that market. *See Flegel*, 4 F.3d at 688; *Brookins*, 219 F.3d at 854. "The relevant market consists of two parts-the product market and the geographic market. The

relevant product market consists of the goods and/or services with which defendant's product competes. The relevant geographic market is the geographic area of effective competition in which the defendant's product is traded." *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 326 n. 3 (8th Cir.1982); *see also Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). A relevant product market is composed of "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). "In determining whether two 'products' are in the same market, it is important to consider the cross-elasticity of demand between the products, i.e., whether consumers will shift from one product to the other in response to changes in their relative costs." *SuperTurf, Inc. v. Monsanto Co.*, 660 F.3d 1275, 1278 (8th Cir.1981); *see also Brookins*, 219 F.3d at 854 (newly-asserted narrower product market required proof of no cross-elasticity of demand). Importantly, a market's definition must be based on more than anecdotal evidence. *See FTC v. Freeman Hosp.*, 911 F.Supp. 1213, 1220 (W.D.Mo.) ("While such non-empirical data may have some probative value as a starting point to evaluate this market, such data will not carry the FTC's burden. Informal, off-the-cuff remarks and anecdotal evidence concerning the marketplace are no substitute for solid economic analysis."), *aff'd* 69 F.3d 260 (8th Cir.1995).

Market power is "the ability (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion." 2A Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* P 501, at 86 (1995). In the Eighth Circuit,

> Market power may be shown by a firm's percentage of sales in the market, especially where there is a strong consumer preference for the firm's product (which decreases the competitive impact of substitutes) and where

> there are significant barriers either to the entry of new firms or to increased output by existing firms. On the other hand, direct evidence of competitive pressure-demonstrated by a significant number of viable competitors in the market, or by the entry of new competetors, or even by the product's price sensitivity-indicates a lack of market power. It is incumbent on the plaintiff to present evidence of defendant's power in the relevant market. . . .

Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1232 (8th Cir.1987) (citations omitted), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 751, 98 L.Ed.2d 763 (1988). "A defendant who establishes, in accordance with the rules governing summary judgment, that it lacks market power a fortiori establishes that no genuine issue of material fact exists and is entitled to entry of judgment in its favor as a matter of law." *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 317 (8th Cir.1986).

IV. Scoggins's Econometric Analysis

Craftsmen asked Scoggins to analyze the impact of Defendants' "anticompetitive behavior" on Craftsmen's net income. Scoggins created a report including "(1) an analysis of the causes of the decline in Craftsmen's profits during the period of the anticompetitive behavior, and (2) our estimate of the economic damages Craftsmen sustained due to this behavior." Scoggins's opinion results, in part, from a multiple regression model. The model uses mathematical and statistical techniques to isolate the cause and amount of Craftsmen's alleged economic losses through hypothesis testing. Scoggins uses a single dependent variable (the variable to be explained) and several independent variables (variables thought to produce or be associated with changes in the independent variable). See Daniel L. Rubinfeld, *Reference Guide on Multiple Regression,* in Reference Manual on Scientific Evidence 181 (Federal Judicial Center 2000).

The dependent variable in the model is Craftsmen's sales. The independent variables are time, time squared, average price of Craftsmen limousines, base units of production, number of competitors, and a "dummy variable" called "antitrust indicator." Scoggins uses the number of competitors in the "specialty limousine" market to represent "competition." The total number of base chassis produced by Ford and General Motors represents "demand." Based on this model, Scoggins finds that the coefficient for the antitrust indicator is statistically significant. He concludes that "the anticompetitive behavior reduced Craftsmen's sales during the 1995-1998 time span," and that the amount of such damage is $1,407,939.

V. Discussion

A. Motion to strike Scoggins's affidavit

By Ford's interpretation, Scoggins admitted at deposition that he did not analyze the effect of the advertising and trade show restrictions; did not analyze the impact of the restrictions on competitors other than Craftsmen; and did not statistically analyze whether Ford had market power or any market share. In his affidavit (accompanying Craftsmen's opposition to summary judgment), Scoggins rejects that interpretation.[1]

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[1] The affidavit states, in part:

> 1. At the request of plaintiffs, I identified the relevant market, analyzed the effects of Defendants' anticompetitive behavior on the relevant market, and analyzed the injury to the plaintiffs. This analysis was done in conjunction with factors identified by the court in [Craftsmen].
>
> . . . .
>
> 8. The Defendants' actions in denying specialty limousine manufacturers access to advertising in trade magazines and trade shows resulted in an exclusion of specialty manufacturers from the limousine market with a corresponding decrease in sales.
>
> 9. The usefulness and admissibility of econometric models in antitrust litigation is well-documented. The econometric model I used to analyze the effect of Defendants' anticompetitive behavior took into

He states, for example, that he did analyze harm to the relevant market, that firms other than Craftsmen were harmed by the advertising restrictions. Ford argues the affidavit is an improper attempt to avoid summary judgment.

"[P]arties to a motion for summary judgment cannot create sham issues of fact in an effort to defeat summary judgment." *Am. Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 111 (8th Cir.1997); *see also Marathon Ashland Petroleum, LLC v. Int'l Nat'l Bhd. of Teamsters*, 300 F.3d 945, 951 (8th Cir.2002); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cir.1988); *cf. Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008-09 (8th Cir.1998) (affirming exclusion of expert testimony opinion submitted after disclosure deadline and filing of opening summary judgment brief). A sham issue of fact arises when a party (or its expert) contradicts its previous testimony. *See American Airlines*, 114 F.3d at 111.

The Court concludes that it will not consider the affidavit. *See id.* Under Craftsmen's own explanation-that the affidavit

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account other factors affecting the demand for specialty limousines, including changes in the aggregate market demand for limousines and changes in the number of competitors in the specialty limousine industry. I later added the number of traditional limousine manufacturers, which changed little from year to year, to the econometric model. The addition of this variable did not change the results of the regression analysis.

. . . .

12. Based on interviews of individuals who work in the industry and an examination of the annual LCT fact books, we found no likely explanation for the drop in the demand of Craftsmen's limousines other than the anticompetitive behavior of Defendants. The conclusion applies to other specialty limousine manufacturers in the market during the applicable time period.

13. Based on the evidence presented at the first trial of this matter, Defendant Ford possessed substantial power within the relevant market.

merely restates the report and deposition-it adds little to the *Daubert* equation. With Scoggins's report, deposition, and hearing testimony, the Court has ample information to assess his opinion.

B. Motion to exclude Scoggins's opinion

Ford contends that Scoggins did not perform necessary analysis of competition in a relevant market to support a rule-of-reason opinion. Thus, Ford argues, Scoggins's opinion cannot aid the jury to understand the evidence or to determine a fact in issue, as is required for admissibility under Rule 702. The Court agrees, and grants Ford's motion to exclude the testimony.

Federal Rule of Evidence 702 governs the admissibility of expert scientific testimony. The Rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702; *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588-95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Rule 702 requires a district court to ensure that expert evidence based on scientific, technical, or other specialized knowledge is "not only relevant, but reliable." *Daubert*, 509 U.S. at 589. For both elements, relevance and reliability, the district court's focus "must be solely on principles and methodology, not on the conclusions" of the expert. *Id.* at 595. The district court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid

and of whether the reasoning or methodology can be applied to the facts at issue." *Id.* at 592-93.

To determine whether proffered testimony is based on reliable scientific knowledge, district courts may evaluate such factors as: (1) whether the underlying scientific theory or technique has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it has an acceptable known or potential rate of error; and (4) whether it is generally accepted in the relevant scientific community. *See id.* at 593-94. To determine whether proffered expert evidence is relevant, courts must examine whether the evidence or testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591. Ultimately, the district court's inquiry must be a flexible one. *See id.* The court should make fact-specific determinations guided by overarching indicia of relevance and reliability. *See id.*

The *Daubert* analysis in this case is informed by the Eighth Circuit's decision. There is no per se illegal restraint. *Craftsmen*, 363 F.3d at 772-76. Craftsmen's expert must "formulate a new opinion using the proper standard under a rule of reason analysis." *Id.* at 777 n. 16. The question before this Court is whether Scoggins's testimony will "sufficiently aid the jury in determining whether there was an 'unreasonable' restraint on trade in violation of the Sherman Act." *See id.* at 777. "To determine the legality of a restraint of trade under the rule of reason, one must focus on the detrimental effects to competition . . . ." *Flegel*, 4 F.3d at 688 (emphasis added). However, it appears that Scoggins assumes "anticompetitive behavior," and focuses only on Craftsmen's *individual* economic harm.[2] Therefore, his opinion testimony cannot assist a

[2] The first paragraph of Scoggins's report states:

> You asked Research and Planning Consultants ("RPC") to provide an analysis of the impact of the anticompetitive behavior by Ford Motor Company and American Coachworks ("the defendants") on

jury in determining harm to competition.

Scoggins's multiple regression tests only whether Defendants' "anticompetitive behavior" caused harm to Craftsmen. Although Scoggins uses an independent variable called "antitrust indicator" to represent alleged anticompetitive conduct, he never analyzes the alleged restraints-advertising and trade show restrictions-to determine if they were anticompetitive. In fact, Scoggins flatly and repeatedly denies the need for such analysis. During deposition, he testifies: "I'm an economist, and on the face of it, an advertising ban is anticompetitive, so there was no need to do any kind of statistical analysis on that issue."[3] Dep. at 43. Scoggins confirms that answer at the *Daubert* hearing. Hearing at 101-02. Scoggins cannot opine that there was "anticompetitive behavior" without having analyzed whether the alleged restraints had an anticompetitive effect. Thus, his opinion that Defendants engaged in "anticompetitive behavior" is based only on his speculation that the restraints at issue were "anticompetitive," which "is not competent proof and contributes nothing to a legally sufficient evidentiary basis." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir.) (internal quotations omitted), *cert. denied*, 531 U.S. 979, 121 S.Ct. 428, 148 L.Ed.2d 436 (2000); *see also Meterlogic. Inc. v. KLT, Inc.*, 368 F.3d 1017, 1019 (8th Cir.2004) ("The district court must exclude expert testimony if it is 'so fundamentally unreliable that it can offer no assistance to the jury.'"); *Blomkest Fertilizer Inc. v. Potash Corp. of Saskatchewan,*

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the net income of Craftsmen Limousine, Inc. ("Craftsmen"). This report includes (1) an analysis of the causes of the decline in Craftsmen's profits during the period of the anticompetitive behavior, and (2) our estimate of the economic damages Craftsmen sustained due to this behavior.

[3] The Court notes the Eighth Circuit's opinion that "the alleged restraints were arguably based, at least in part, on safety concerns." *Craftsmen*, 363 F.3d at 776.

Inc., 203 F.3d 1028, 1038 (8th Cir.) (There must be "sufficient facts already in evidence or disclosed by the witness as a result of his or her investigation to take such expert opinion testimony out of the realm of guesswork and speculation."), *cert. denied*, 531 U.S. 815, 121 S.Ct. 50, 148 L.Ed.2d 19 (2000).

Scoggins's econometric analysis applies only to Craftsmen, not other competitors. Craftsmen asserts the economic analysis is supplemented by Scoggins's interviews with the owners of other specialty-limousine firms. At the hearing, Scoggins testified that he made many phone calls to firms that had gone out of business, or that refused to assist in this litigation. The Court appreciates the difficulty in acquiring data from competitors. But the fact is, Scoggins's only other "analysis" comes from a telephone conference with the owner of Legendary Coachworks, who said that Legendary's sales decreased and she thought it was because of advertising. Hearing at 91-94. These "informal, off-the-cuff remarks" add little to the econometric analysis. *See Freeman Hospital*, 911 F.Supp. at 1220. Without more, Scoggins's analysis of Craftsmen cannot fairly be extended to an opinion of harm to competition in a relevant market.

In interrogatory answers, Craftsmen defines the relevant market as all limousines manufactured by all coachbuilders and manufactured from any type of base unit. Scoggins does not follow that definition. Instead, he defines the relevant market as "specialty limousines" (stretched more than 120 or 130 inches), specifically excluding "traditional limousines" (stretched 120 inches or less). Scoggins offers no analysis to support "specialty limousines" as a relevant market. He does not analyze the "reasonable interchangeability" of "specialty" and "traditional" limousines to determine whether those products were substitutes and whether they exhibited a high cross-elasticity of demand from buyers. *See du Pont*, 351 U.S. at 395; *Brookins*, 219 F.3d at 854. Scoggins admits that

"specialty" and "traditional" limousines are substitute products, but, with little explanation, says they are not "close substitutes." Dep. at 52-53. In short, Scoggins's relevant market definition contradicts the definition initially asserted by Craftsmen, and is not supported by any empirical evidence. *See Brookins*, 219F.3d at 854; *Freeman Hospital*, 911 F.Supp. at 1220. This definition-a linchpin of Scoggins's entire opinion-cannot aid the jury to understand the evidence or to determine a fact in issue.

Unlike the expert at the first trial, Scoggins did consider other factors that may have affected Craftsmen's growth rate. *See Craftsmen*, 363 F.3d at 777. He may have attempted "to formulate a new opinion using the proper standard under a rule of reason analysis." *See id.* at 777 n. 16. However, this Court concludes that the expert opinion does not "sufficiently aid the jury in determining whether there was an 'unreasonable' restraint on trade in violation of the Sherman Act." *See id.* at 777. Because Scoggins's opinion cannot "assist the trier of fact to understand the evidence or to determine a fact in issue," it is inadmissible under Rule 702. *See Daubert*, 509 U.S. at 589; Concord Boat, 207 F.3d at 1057.

C. Defendants' motions for summary judgment

Craftsmen's opposition to summary judgment relies almost entirely on Scoggins's opinion. Without his testimony, a jury has no sufficient basis from which to conclude that the advertising and trade show restrictions unreasonably restrained competition.[4] Therefore, Defendants' requests for summary judgment must be granted.

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[4] Even with Scoggins's testimony as evidence, this Court questions whether Craftsmen can prove actual adverse effects on competition, or a relevant "specialty limousine" market and any defendant's power in any relevant market.

VI. Conclusion

For the reasons stated, the Court hereby

GRANTS Ford's motion to strike the affidavit of Craftsmen's expert John Scoggins (Doc. 745);

GRANTS Ford's motion to exclude the testimony of Craftsmen's expert John Scoggins (Doc. 748);

GRANTS Ford's motion for summary judgment (Doc. 727); and

GRANTS American Custom Coachworks' motion for summary judgment (Doc. 735).

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
W.D. MISSOURI
SOUTHERN DIVISION

No. 98-3454-CV-S-DW

CRAFTSMEN LIMOUSINE, INC., *et al.*,
Plaintiffs,

v.

FORD MOTOR COMPANY, *et al.*,
Defendants.

Sept. 12, 2005

ORDER

WHIPPLE, J.

Pending before the Court is Plaintiffs' motion for partial summary judgment based on the law of the case (Doc. 729). The motion is denied.

After a jury trial in this case, Defendants appealed. Seeking judgment in their favor, they argued "that the jury's verdict must be reversed, because the evidence was insufficient to establish a conspiracy between Ford and American Coach." *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir.2004). But the Court of Appeals held that "the evidence introduced at trial was sufficient to create a jury question as to whether the defendants acted in concert or independently." *Id.* at 772. The Court of Appeals then reversed on other grounds and remanded for a new trial.

Here, Plaintiffs argue that the jury's finding of a conspiracy is the "law of the case," and thus Plaintiffs do not have to

prove conspiracy at trial before this Court. "The law of the case doctrine directs courts to follow decisions made in earlier proceedings to prevent the relitigation of settled issues in a case. . . ." *Bethea v. Levi Strauss and Co.*, 916 F.2d 453, 456 (8th Cir.1990). True, the Eighth Circuit's sufficiency holding is the law of this case unless substantially different evidence is introduced at the new trial. *See In re Progressive Farmers Ass'n*, 829 F.2d 651, 655 (8th Cir.1987). However, the scope of the new trial is a distinct issue.

"On remand, a district court is bound to obey strictly an appellate mandate." *Bethea*, 916 F.2d at 456. In its opinion, the Court of Appeals concluded: "For the foregoing reasons, the district court's damages award is vacated, and the case is remanded for a new trial on Craftsmen's Sherman Act claim." Craftsmen's Sherman Act claim invokes section 1 of the Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Because the conspiracy issue is part of Craftsmen's Sherman Act claim, it will be part of the new trial. *See Ehrhardt v. Penn Mut. Life Ins. Co.*, 21 F.3d 266, 269 (8th Cir.1994) ("Because this court, in its opinion in *Ehrhardt I* did not limit its new trial to only certain issues, the trial court properly construed the remand to require a new trial on all issues."). The Court hereby

DENIES Plaintiffs' motion for partial summary judgment based on the law of the case.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 03-1441, 03-1544, 03-1444, 03-1546

CRAFTSMEN LIMOUSINE, INC., and JMRL SALES & SERVICE, INC., doing business as Craftsmen Limousine,
Appellee,

v.

FORD MOTOR COMPANY and AMERICAN CUSTOM COACHWORKS,
Appellants.

CRAFTSMEN LIMOUSINE, INC., a Missouri corporation, JMRL SALES & SERVICE, doing business as Craftsmen Limousine, Inc., a Missouri corporation,
Appellees;

v.

FORD MOTOR COMPANY, a Delaware corporation; GENERAL MOTORS CORPORATION, a Missouri corporation; CADILLAC, a division or affiliate of General Motors Corporation; LIMO, an association of limousine builders; AHA AUTOMOBILE DESIGN, a Canadian corporation,
Appellants.

Submitted: Sept. 10, 2003
Filed: April 13, 2004
Rehearing and Rehearing En Banc Denied May 5, 2004

Before MELLOY, and SMITH, *Circuit Judges.*

MELLOY, *Circuit Judge.*

Limousine manufacturers, Craftsmen Limousine, Inc. and JMRL Sales & Service, Inc., collectively referred to as "Craftsmen," sued American Custom Coach ("American Coach"), several other limousine manufacturers, and Ford Motor Company ("Ford") for antitrust violations under the Sherman Act, 15 U.S.C. § 1[1]. Craftsmen alleged that defendants conspired to prevent it from advertising in the limousine industry's two trade publications and from attending trade shows. At trial, the jury rendered a verdict in favor of Craftsmen in the amount of $2,109,707.00. Craftsmen then filed a motion to treble the verdict and for attorney fees and costs. After denying defendants' post-trial motions, the district court granted Craftsmen's motion for fees and trebled Craftsmen's damage award to $5,941,621.00. Defendants now appeal. We affirm in part and reverse in part.

I. BACKGROUND

A. Craftsmen, Ford, American Coach, & the National Highway Traffic Safety Administration

Craftsmen is a closely held corporation owned by Robert Haswell and Marc Haswell. Since it began in the late 1980's, Craftsmen has converted many automobiles, including Ford's Lincoln Town Cars, into limousines. Like other coachbuilders, Craftsmen creates limousines by cutting a base vehicle in half and adding structural pieces of varying lengths in the middle. Craftsmen sells from an inventory of pre-built units and also offers conversion services on vehicles already owned by the end-users. American Coach, one of the largest manufacturers of limousines in the United States, is one of Craftsmen's direct competitors.

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[1] Craftsmen voluntarily dismissed or settled with all defendants but Ford and American Coach.

Ford does not make limousines. Instead, it manufactures base vehicles that are later converted into limousines by independent coachbuilders like American Coach and Craftsmen. During the relevant time period in this case, approximately sixty percent of the six thousand limousines produced each year were converted from Ford's Lincoln Town Cars.

The limousine industry is regulated by the National Highway Traffic Safety Administration. The National Highway Traffic Safety Administration promulgates Federal Motor Vehicle Safety Standards with which limousine manufacturers must comply. Coachbuilders are responsible for self-certifying that their vehicles meet the federal safety standards. This self-certification can be in the form of engineering analysis, computer analysis, or other valid documentation. If the National Highway Traffic Safety Administration determines that a coachbuilder's limousine fails to comply with federal standards, it has the authority to fine the coachbuilder and recall the limousine.

In 1992, upon the National Highway Traffic Safety Administration's request, Craftsmen submitted data identifying its limousine conversion techniques. Craftsmen did not provide engineering analyses to demonstrate compliance with all Federal Motor Vehicle Safety Standards requirements. Instead, it claimed its vehicles were safe based on the construction techniques employed and the fact that none of its customers ever returned a limousine out of a concern for safety.[2] At the time, no engineers worked for Craftsmen, and the company had not contracted an independent engineer to test the safety of its vehicles.

After receiving Craftsmen's data, the National Highway Traffic Safety Administration conducted an inspection of

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[2] Craftsmen also relied upon testing Ford had conducted on its base vehicles to verify the safety of components that were not altered during the conversion process, such as door locks.

Craftsmen's limousines. The investigation resulted in the recall of some of Craftsmen's vehicles. One recall required Craftsmen to put a placard in its limousines instructing passengers that they had to "unlock door and pull door latch" to exit the vehicle. Another required Craftsmen to replace tires on approximately twenty of its limousines. Craftsmen complied with the recall orders and was not fined by the National Highway Traffic Safety Administration.

B. The Formation of Ford's QVM Program

On April 3, 1987, a wedding party in New York was killed when its limousine was hit and split in half as it crossed an intersection. National media coverage of this accident, coupled with other reports of limousine fires and tire blow-outs, prompted the National Highway Traffic Safety Administration to conduct an investigation of the limousine industry. The National Highway Traffic Safety Administration found that there were approximately fifty to sixty coachbuilders nationwide. A few large coachbuilders converted up to one thousand vehicles per year, but many coachbuilders converted one hundred vehicles or less. Some coachbuilders had engineering backgrounds, others did not; some worked out of dirt floor garages, and others out of modern facilities. At trial, Robert Hellmuth, former director of the National Highway Traffic Safety Administration's Office of Vehicle Safety Performance, testified that there was little uniformity in the conversion techniques being used at the time. Most coachbuilders either disregarded the Federal Motor Vehicle Safety Standards or were unaware they existed.

After the National Highway Traffic Safety Administration's investigation, Robert Hellmuth urged Ford, General Motors, and the members of the limousine industry to pool their resources to develop testing to make sure that limousines were in compliance with federal safety standards. At trial, Robert Hellmuth recalled his discussion with Ford and General Motors as follows:

> I said, you know, [the coach-builders] are buying your product, and it would certainly be a wonderful idea for you to help them out, because they certainly don't have the facilities you do, they don't have the technical information you do, and if, if they can't rely on you, you know, they're really not going to be able to build a safe vehicle. (Tr. 1536-37.)

Thereafter, Ford assembled a team of forty-five to fifty engineers to ensure that the 418-Town Car chassis met all federal safety requirements when stretched within certain defined limits. After spending over one year and millions of dollars designing and testing the new 418-Town Car chassis, Ford initially limited 418-conversions to end-products that weighed 7,100 pounds or less and were not longer than 85 inches. Later, Ford determined that 418-Town Cars could be safely stretched to 120 inches.

After conducting this research, Ford formed a vehicle certification program called "Quality Vehicle Modifier" ("QVM"). Through its QVM program, Ford distributed information explaining how to convert Ford 418-Town Cars into limousines that met Federal Motor Vehicle Safety Standards. The manufacturing guidelines, which were available to non-QVM participants and QVM participants alike, set forth conversion techniques, quality control procedures, and continuous improvement practices. As an incentive for complying with its guidelines, Ford paid QVM participants $2,000 to $3,000 for each 418-Town Car properly converted. If a QVM participant stretched a 418-Town Car outside the limits Ford specified, or stretched any other Ford product, the coachbuilder would no longer be eligible for the QVM program incentives unless it provided test data establishing Federal Motor Vehicle Safety Standards compliance.[3] Ford engineer, Roy Radokovich, tes-

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[3] To assist those coachbuilders wanting to safely go beyond the QVM guidelines, Ford provided the names of engineering firms that did testing or analysis. T1461.

tified that by helping coachbuilders build safer products that met all Federal Motor Vehicle Safety Standards, Ford hoped to reduce the potential liability it faced from having its name associated with untested limousines. Radokovich further testified that Ford hoped the QVM program would improve its product image and help Ford compete with General Motors in the luxury car market.

Within two years after Ford's introduction of the QVM program, General Motors introduced a similar safety program, the Cadillac Master Coachbuilders program ("CMC"). The vast majority of coachbuilders in the industry participated in the QVM or CMC program or both.

Shortly after unveiling QVM, Roy Radokovich visited Craftsmen's facilities and asked Robert Haswell to enroll Craftsmen in the program. Haswell testified that he declined for the following reasons: (1) Craftsmen had little to gain from joining, as it was already employing the conversion techniques described in the QVM manual; (2) Craftsmen had already safely built and sold a number of limousines that exceeded the QVM's length restrictions, and if it were to stop building these longer limousines, Craftsmen would dissolve;[4] and (3) Craftsmen did not want to purchase insurance naming Ford as an insured, which was a requirement of the QVM program. At trial, Radokovich admitted that he was impressed with Craftsmen's building process. He testified that Craftsmen had all the QVM information Ford had disseminated, and that Craftsmen had built conversion parts in accordance with the QVM guidelines. A National Highway Traffic Safety Administration safety compliance engineer who inspected Craftsmen's limousines in the early 1990's agreed that Craftsmen appeared to be following QVM practices.[5]

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[4] The record indicates that more than ninety percent of Craftsmen's conversions were over 120 inches.

[5] The National Highway Traffic Safety Administration safety compli-

At trial, Craftsmen argued that although QVM disguised itself as an overseer of safety, it was actually formed to increase Ford's profits from its control of the limousine manufacturing market. Marc Haswell testified that Ford's safety goals were belied by the fact that some QVM builders reduced the gauge of the metal they used and omitted structural pieces that ensured the structural integrity of their limousines. Marsha Tortora, one of the first participants in QVM, testified that from 1990 to 1997 Ford did nothing to determine whether her limousines were safe. Craftsmen claimed that during that time period, Ford never tested the safety of any of the vehicles produced by QVM manufacturers.

Robert Hellmuth, former director of the National Highway Traffic Safety Administration's office of Vehicle Safety Performance, gave a different account of the efficacy of the QVM program. He stated:

> The people that got into the QVM program really started building nice vehicles because they had something they could hang their hat on . . . They had all the Ford test data[.] Ford did all the crash work for them, did all the documentation, they did everything. Basically if you were in the QVM program and you built it like they told you to build the thing, it would be fully certifiable, it would meet the [federal] standards, it would be a safe vehicle. (Tr. 1547-48.)

Hellmuth further testified that Ford's QVM handbook was "[b]asically a cookbook recipe on how to build a limousine to meet all the federal safety standards." (Tr. 1547.)

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ance engineer who inspected the brake systems on Craftsmen's vehicles concluded: "[I]t appears Craftsmen exercised caution during vehicle production by following Ford's QVM guidelines for limousine manufacturers and sound manufacturing processes for all other vehicles. Therefore, Craftsmen's limousines may meet the performance requirements of [the federal safety standard pertaining to hydraulic brakes], but there is no test data to form definite conclusions." (App. at 2320.)

C. The Formation of LIMO

Around the same time Ford created QVM, the National Highway Traffic Safety Administration, Ford, and General Motors suggested the formation of the Limousine Industry Manufacturers' Organization ("LIMO"). The National Highway Traffic Safety Administration hoped that LIMO would provide its members with technical information, keep them apprised of upcoming legislation, and enable them to pool their resources for additional safety testing. The record suggests that LIMO did not accomplish all of these objectives. In 1990, the National Highway Traffic Safety Administration commended LIMO's effort to organize safety testing but criticized its failure to provide significant test data.[6]

Although Ford was not a limousine manufacturer, it became a non-voting member of LIMO. American Coach was a voting member. Craftsmen contends that defendants lobbied to exclude it from LIMO. Former LIMO President, Marsha Tortora, testified that during LIMO meetings, Ford's representative would "talk about the importance of QVM, [and] that they had to keep non-compliant people out." (Tr. 323.) Tortora testified that American Coach's representative was equally adamant against allowing non-QVM coach-builders to join LIMO. According to Tortora, he feared it would take the spotlight away from American Coach's pro-duct and would "make Ford unhappy." (Tr. 295.)

Although Tortora believed that LIMO's doors should be opened to QVM and non-QVM coachbuilders alike, LIMO's bylaws initially limited membership to QVM coachbuilders. However, the bylaws were amended in 1995 to allow non-QVM coachbuilders to join LIMO upon submitting valid crash-test results. Because Craftsmen was not a member of

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[6] The only test reports LIMO submitted to the National Highway Traffic Safety Administration were in regard to the safety of limousine hydraulic brake systems.

QVM and did not perform crash-tests on its vehicles, it was not eligible to join LIMO.

D. Alleged Group Boycott

To reach its target market, Craftsmen advertised in limousine magazines and displayed its vehicles at the magazines' trade shows. Craftsmen advertised in *Limousine & Chauffeured Magazine* from 1989 to 1991, when the two had a disagreement over a billing dispute. Thereafter, it began advertising in *Limousine Digest*. Until 1997, *Limousine Digest* and *Limousine & Chauffeured Magazine* were the only trade publications in the limousine industry.[7]

In 1993, *Limousine & Chauffeured Magazine* enacted a policy limiting all limousine advertisements and participation in its trade shows to products that met QVM or CMC standards. Thereafter, *Limousine Digest* also stopped allowing Craftsmen to advertise vehicles that exceeded QVM restrictions, and it rescinded Craftsmen's invitation to attend its 1995 trade show. In May 1996, *Limousine Digest* formally enacted a restrictive advertising policy similar to the one *Limousine & Chauffeured Magazine* had previously adopted.[8] However, *Limousine Digest's* policy was not a blanket-ban on all non-QVM products; it allowed non-QVM coachbuilders to advertise upon submitting independent proof of Federal Motor Vehicle Safety Standards compliance.

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[7] In 1997, two new magazines entered the limousine publications market, *Dealer's National Limousine Exchange* and *International Limousine and Livery Trader*. At trial, Haswell testified that these two publications were not comparable to *Limousine Digest* or *Limousine & Chauffeured Magazine*, as neither provided national exposure.

[8] Although Craftsmen was allowed to attend *Limousine Digest's* 1996 trade show, which took place before *Limousine Digest* adopted its formal ban, Craftsmen received unfavorable treatment: it was relegated to an obscure location behind a curtain; it was required to remove its display car from the showroom after only one night of the three-night show; and it was not allowed to distribute brochures.

At trial, Craftsmen introduced evidence that the magazines' restrictive advertising policies were the result of threats leveled by Ford, American Coach, and other members of LIMO. Marsha Tortora testified that *Limousine & Chauffeured Magazine's* publisher, Sara McLean, told her that the magazine's policy was a result of direct pressure she had received from Ford and the QVM coachbuilders who were voicing their concerns through LIMO. (Tr. 310-12.) Similarly, Robert Haswell testified that *Limousine Digest's* publisher, Ric Cohen, told him that he "was getting pressure to change [Craftsmen's] ad so that [Craftsmen] did not show anything that [QVM coachbuilders] couldn't build." (Tr. 936.) Haswell further testified that when he asked Cohen why he had removed a particular Craftsmen advertisement from *Limousine Digest*, Cohen replied that he had received "all kinds of heat," and that "in order to have a show, [he] had to agree to remove [Craftsmen] and the other non-QVM builders from the magazine as well as the show." (Tr. 958.)

Craftsmen also introduced written evidence showing that *Limousine Digest* was pressured into adopting its advertising restrictions. Minutes of an April 30, 1996 LIMO meeting established that LIMO members unanimously agreed not to endorse or participate in any publication or trade show that promoted non-QVM/CMC coachbuilders. (App. at 2091-92.) Thereafter, LIMO President, Cabot Smith, wrote *Limousine Digest's* publisher, Ric Cohen, a letter informing him of LIMO's policy. (App. at 2093-94.) Upon receiving Smith's letter, Ric Cohen, replied with the following confirmation:

> Effective immediately, we have decided to respond favorably to all of your requests by removing all Non-Compliant advertisements from *Limousine Digest*, as of the very next issue to go to press (July '96). We will also maintain our policy of only allowing QVM and CMC certified limousine manufacturers to exhibit their ve-

> hicles at the '96 Limo Digest Show.[9] We are making those concessions contingent upon your agreement to provide the full and exclusive endorsement of LIMO and all of its members for the '96 Limo Digest Show.

Please understand the severe financial implications that this will have upon my company and kindly convey your understanding to any members of our industry that can help to support the changes we are making. I would greatly appreciate LIMO's assistance in attracting additional and more regular support from Lincoln and Cadillac to further assist us in this development. (App. at 2095.)

Two days after receiving Cohen's letter, Cabot Smith sent the following fax to his fellow LIMO members:

> Congratulations!
>
> Attached you will find a commitment in writing from Ric Cohen of *Limousine Digest* to remove all non-QVM and non-CMC advertisers from his magazine and from displaying at this show.

The message LIMO sent was loud and clear because it was supported in writing by the individual member companies.

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[9] At trial, Ric Cohen testified that *Limousine Digest's* policy allowed non-QVM/CMC coachbuilders to advertise if they presented independent proof of Federal Motor Vehicle Safety Standards compliance. (Tr. 1285.) Ultra Limousine, a non-QVM coachbuilder, provided *Limousine Digest* with independent crash-testing data and subsequently advertised a non-QVM limousine in the publication. Ultra agreed to share its crash-testing data with Craftsmen in exchange for $35,000, half the crash-testing cost. Robert Haswell testified that he declined Ultra's offer, because crash-testing was not required for Craftsmen to meet National Highway Traffic Safety Administration standards. The record contains a memorandum written by a National Highway Traffic Safety Administration safety compliance engineer indicating that the National Highway Traffic Safety Administration did not require Craftsmen to crash-test its limousines due to their weight. (App. at 2317).

This unified voice and member support is what LIMO needs to accomplish its objectives. (App. at 2085.)

Craftsmen also presented evidence that LIMO members continued to apply pressure to *Limousine Digest* even after the publication adopted its 1996 restrictions. Coachbuilder Bill Alden testified that he listened to a telephone conference call between Cohen and a number of LIMO members in 1997 or 1998, during which the coachbuilders threatened to quit advertising in *Limousine Digest* if it allowed non-QVM coachbuilders to attend its trade show. To the best of Alden's knowledge, no one from Ford participated in the conference call.

E. Was Ford Driving LIMO?

Ford argues that to the extent LIMO may have influenced *Limousine & Chauffeured Magazine* or *Limousine Digest* to exclude non-QVM coachbuilders, Ford played no role in LIMO's actions. Ford relies on the testimony of Marsha Tortora to support its position. Tortora admitted that the main focus of every LIMO meeting was on how to keep non-QVM coachbuilders from advertising and attending trade shows, but she said that most of those discussions were held in executive sessions that Ford, as a non-voting member, was not allowed to attend. Tortora acknowledged that some of the discussions took place in open session, but stated that "Ford was very hands off in those conversations most of the time."[10] According to Tortora, "[i]n open discussion, . . . Ford didn't tell [coachbuilders] not to participate in the shows, they said they won't participate in the shows that had non-QVM's in it." (Tr. 372.)

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[10] During cross-examination, Tortora testified that when Vinnie Bergman, a non-QVM coachbuilder, tried to join LIMO, Ford spoke out loudly against it. Despite Ford's protest, LIMO extended membership to Bergman. Defendants claim that they did not want Bergman in LIMO, because he had a reputation for dishonesty and engaged in questionable business practices.

Craftsmen maintains that Ford was well aware of LIMO's goals, inasmuch as it attended LIMO meetings, heard its discussions about boycotting non-QVM dealers, and lobbied to keep non-QVM members from joining LIMO. Craftsmen notes that although Tortora testified that Ford was ordinarily "very hands off" during the open session discussions about advertising, she also testified that it was "no secret" that Ford did not want QVM members to advertise in magazines that promoted non-QVM products. (Tr. 375-76). In fact, she stated that "[Ford] told [her] outright and in writing that [she] couldn't participate or sell or have any business with anybody who was non-QVM." (Tr. 376.)

F. Damages

Craftsmen claimed that it lost conversion fees, ranging from $25,000 to $35,000 per vehicle, from January 1995 through June 1998.[11] It presented evidence that its sales decreased from approximately 50 vehicles in 1995 to approximately 37 vehicles in 1997. Craftsmen alleged that this decline was a result of defendants' alleged boycott. In support of Craftsmen's contention, Robert Haswell testified that some of Craftsmen's customers called just to see if it was still in business when Craftsmen was not advertising in the trade magazines. However, Marc Haswell admitted that between 1995 and 1999 Craftsmen's website received approximately 90,000 hits.

Defendants denied that any of their actions caused the decrease in Craftsmen's conversions. They claimed that other factors, including increased competition, affected Craftsmen's growth rate. At trial, Robert Haswell conceded that

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[11] The record suggests that by 1998, Craftsmen began converting sport utility vehicles and buses to mitigate its damages. One of the sport utility vehicles Craftsmen converted was Ford's Lincoln Navigator. *Limousine & Chauffeured Magazine* allowed Craftsmen to advertise the stretched Navigators until Ford barred QVM dealers from converting Navigators.

two new non-QVM coachbuilders, Legendary Coachworks and S & R Coachworks, entered the market in 1995. S & R Coachworks was founded by a person who previously had been responsible for cutting, welding and stretching Craftsmen limousines. Like Craftsmen, Legendary Coachwo.ks and S & R Coachworks both built non-QVM limousines in excess of one-hundred twenty inches.

Before trial, the district court held a hearing to determine whether plaintiffs' expert witness, David Cole, passed muster under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Cole is a certified public accountant. In addition to taking post-graduate courses covering all areas of financial management, including economics, marketing, and finance, Cole has also served as the executive vice president for a national accounting firm and has worked with privately held businesses to establish property values for buy-sell agreements and values for estate tax purposes. Although Cole had no experience in the field of antitrust litigation, he reviewed scholarly literature to support his method of calculating damages in this case.

Cole used a "but for" method to determine Craftsmen's damages. Using Craftsmen's financial statements and tax returns, he calculated an average growth rate of sixty-two percent for the time period beginning in 1991 and ending in 1994. Cole testified that this figure was reasonable in light of conversations he had with Robert Haswell and his review of an outside study that supported his figure. Cole then testified that he calculated what Craftsmen's sales would have been with the projected growth rate and compared those figures to Craftsmen's actual sales. After offsetting the difference between these two figures by Craftsmen's projected operating expenses during the damage period.[12] Cole concluded that

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[12] Cole used the term "cost of sales" to reflect Craftsmen's operating expenses. He testified that he needed a calculation to derive an average

Craftsmen sustained a net profit loss of $2,109,770.00. In reaching this figure, Cole did not analyze whether general economic conditions or increased competition affected Craftsmen's growth rate. Instead, he assumed that defendants caused all of Craftsmen's injuries. The district court found that Cole's testimony was sufficiently relevant and reliable to go to the jury.

II. APPLICABLE LAW AND DISCUSSION

A. Whether the Evidence Was Sufficient to Establish an Antitrust Conspiracy

Defendants argue that the jury's verdict must be reversed, because the evidence was insufficient to establish a conspiracy between Ford and American Coach. In determining whether the evidence is sufficient to support a jury's verdict, we view the evidence in a light most favorable to the appellee. *Pumps & Power Co. v. Southern States Indus., Inc.*, 787 F.2d 1252, 1258 (8th Cir.1986). We must assume as proven all facts that the appellee's evidence tended to show, give it the benefit of all reasonable inferences, and assume that all conflicts in evidence were resolved in its favor. *Id.* at 1258.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Because defendants typically cannot be relied on to confess that they have entered into an unlawful agreement, conspiracy cases usually must be proved by circumstantial evidence. *ES Development Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 553 (8th

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growth profit percentage "so that sales that we didn't realize in the future wouldn't have been all profit. They would have been a percentage, because there's obviously a cost associated with those sales. So, we had to come up with the average growth profit percentage in order to apply it to the sales that were lost in order to get a lost profit number." Ap. 1773-74 Cole testified that he calculated a figure of 83.75% as the "average cost of sales as compared to gross sales for the period '95 through '98." *Id*

Cir. 1991) ("[I]t axiomatic that the typical conspiracy is rarely evidenced by explicit agreements, but must almost always be proved by inferences that may be drawn from the behavior of the alleged conspirators.") (internal quotations omitted). "Thus, an antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to warrant and finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement." *Id.* at 554 (internal quotations omitted).

Although it may be in the form of circumstantial evidence, a plaintiff must present some evidence that tends "'to exclude the possibility that the alleged coconspirators acted independently.'" *St. Louis Convention & Visitors Comm'n. v. N.F.L.*, 154 F.3d 851, 861 (8th Cir. 1998) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). "Conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Lovett v. General Motors Corp.*, 998 F.2d 575, 578 (8th Cir. 1993) (citing *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348). Furthermore, "In situations where a trade association, its officers, employees or members are found to have violated the antitrust laws, membership in the association will not automatically involve all members in the violation. There must, instead, be some evidence of actual knowledge of, and participation in, the illegal scheme in order to establish a violation of the antitrust laws by a particular association member." *AD/SAT v. Associated Press*, 181 F.3d 216, 234 (2nd Cir.1999) (quoting Thomas Vakerics, Antitrust Basics, § 6.13).

Defendants argue that the record contains no evidence from which a reasonable jury could find that they conspired to exclude Craftsmen from advertising or attending trade shows. They note that LIMO's President testified that Ford "didn't

tell us not to participate in shows, they said they won't." According to defendants, this evidence confirms that Ford acted independently. Ford argues that even if LIMO's policies evinced concerted action, Ford never voted on or participated in the making of those policies. Defendants arguments are unpersuasive.

We agree with the district court that the April 30, 1996 LIMO meeting minutes, the May 7, 1996 letter from Ric Cohen to Cabot Smith, and the May 9, 1996 fax from Cabot Smith to his fellow LIMO members provided ample evidence from which a reasonable jury could find that defendants engaged in a conspiracy in violation of Section 1 of the Sherman Act. The clear import of these documents is that LIMO members collectively pressured Limousine Digest to exclude non-QVM coachbuilders, like Craftsmen, from advertising in their publications and attending their trade shows. From this evidence, a reasonable jury could infer that LIMO applied similar pressure to the industry's only other national publication at the time, *Limousine & Chauffeured Magazine.* Although Ford was not a voting member of LIMO, there is sufficient evidence, including Marsha Tortora's testimony,[13] from which a reasonable jury could find that Ford influenced LIMO's agenda. Taken as a whole, the evidence introduced at trial was sufficient to create a jury question as to whether the defendants acted in concert or independently.

B. Whether the District Court Erred in Applying the *Per Se* Analysis.

We review the district court's determination that the alleged agreement between Ford and American Coach constituted a *per se* antitrust violation *de novo*. *In re Cardizem CD*

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[13] Tortora testified that Ford sometimes took part in LIMO meeting discussions on how to keep non-QVM coachbuilders from advertising and attending trade shows, and that Ford expressly forbade her from dealing with non-QVM coachbuilders. (Tr. 376.)

Antitrust Litigation, 332 F.3d 896, 905-06 (6th Cir.2003); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, P 1909b (1998) (although a court's determination that the *per se* rule applies "might involve many fact questions, the selection of a mode [of analysis] is entirely a question of law.").

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Despite its broad language, Section 1 has long been interpreted to outlaw only those restraints hat are "unreasonable." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). The United States Supreme Court has set forth three methods for analyzing the reasonableness of a restraint on trade: rule of reason analysis, *per se* analysis, and quick look analysis.

The rule of reason is the "prevailing standard" for determining a restraint's effect upon competition in a relevant market. *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) ("there is a presumption in favor of a rule-of-reason standard"); *State Oil Co. v. Khan*, 522 U.S. 3, 22, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) ("[T]he majority of commercial arrangements subject to the antitrust laws[ ] should be evaluated under the rule of reason"). Under this approach, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about he relevant business, its condition before and after he restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co.*, 522 U.S. at 10, 118 S.Ct. 275.

When a restraint's negative impact on competition is immediately discernable and the restraint has no redeeming virtue, the per se mode of analysis applies. *Continental T.V., Inc.*, 433 U.S. at 50, 97 S.Ct. 2549; *State Oil Co.*, 522 U.S. at 10, 118 S.Ct. 275 ("Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*."). Unlike the rule of reason analysis, *per se* analysis does not allow inquiry into the intent behind the restraint, its pro-competitive justifications, or its actual effect on competition. *Cardizem*, 332 F.3d at 906-07 (citing *National Collegiate Athletic Ass'n. v. Board of Regents*, 468 U.S. 85, 100, 104 S.Ct., 2948, 82 L.Ed.2d 70 (1984)). Instead, the *per se* mode of analysis applies a "'conclusive presumption'" of illegality. *Id.* (quoting *Maricopa County*, 457 U.S. at 344, 102 S.Ct. 2466). Because of the strength of this presumption, the *per se* analysis is appropriate only where "experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it." *Maricopa County*, 457 U.S. at 344, 102 S.Ct. 2466. "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958) (internal citations omitted).

In cases where the repercussions of a suspicious restraint are unclear, courts may make a truncated inquiry into the restraint's output or price effects before deciding which mode of analysis to apply. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) (applying quick look approach to a horizontal agreement among dentists to withhold from their customers a particular service); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 676 (7th Cir.1992) *cert. denied*, 506 U.S. 954, 113 S.Ct. 409, 121 L.Ed.2d 334 (1992) (finding that district court did not err in application of "quick look" analysis). This "quick

look" approach is "reserved for circumstances in which the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications." Areeda & Hovenkamp at P 1911a. After taking a "quick look" at the defendant's proffered reasons for the restraint, a district court has three options:

> First, it may reject that evidence and condemn the restraint with little or no inquiry into power (as unlawful "*per se*"); second, it may find the evidence essentially unconvincing, but still have a few doubts about whether the restraint itself is appropriate for *per se* condemnation, thus making at least a quick look at market power appropriate; or third, it may find the evidence *plausible*, in which case the restraint is subjected to general rule of reason analysis requiring full consideration of power and anticompetitive effects. Areeda & Hovenkamp at P 1911c (emphasis added).

At trial, the district court found that Ford had "transformed itself into a horizontal competitor" through its action and influence with the QVM manufacturers. (Tr. 1431.) Without further analysis, the district court held that the per se rule was applicable. On appeal, Ford argues that it is not a horizontal competitor of Craftsmen, because Ford does not manufacture limousines. Ford therefore contends that the alleged agreements between Ford and American Coach were vertical restraints subject to the rule of reason analysis. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998) (holding that the per se rule does not apply to a vertical agreement between a buyer and supplier, and noting that "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors"); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) (applying the *per se* rule to a boycott arranged by a single

competitor of the plaintiff, but carried out by a "wide combination" consisting of manufacturers and distributors, as well as the competing retailer). We need not determine whether Ford "transformed" itself into a horizontal competitor. Even assuming Ford and American Coach were direct competitors of Craftsmen, the per se rule should not have been applied in this case.[14]

Through its QVM program, Ford established voluntary safety standards for the manufacture of limousines. Although most coachbuilders joined the QVM program and agreed to build within QVM guidelines, some coachbuilders, like Craftsmen, chose not to join or abide by QVM restrictions. Craftsmen alleged that defendants effectively shut them out of the market by pressuring the limousine industry's trade publications to exclude non-QVM coachbuilder from advertising and attending trade shows. In essence, defendants alleged restraint was an attempt to force Craftsmen to either comply with QVM guidelines or stop selling limousines. The question is whether Ford's insistence on QVM compliance was arguably rooted in safety concerns, and if so, whether this should remove the alleged agreement from theper se rule's realm. We believe it does.

As Areeda & Hovenkamp note, "Exclusion by the joint setting and enforcement of standards is ordinarily evaluated under the rule of reason." P 2232b. This is so because the creation and enforcement of standards, including safety

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[14] The dissent in footnote 3 glosses over a fundamental question that must precede application of the *per se* analysis-whether Ford is a horizontal competitor of the coachbuilders. Ford does not manufacture or sell limousines. It manufactures base vehicles that are later converted into limousines by coachbuilders. Aside from safety and liability concerns, we question whether there are any rational economic reasons for Ford to compete with any of the coachbuilders. Unlike the dissent, we also question whether Ford's position in the market as a supplier of base vehicles to coachbuilders changed with the formation of QVM and LIMO.

standards, often has pro-competitive effects. For example, having unsafe limousines in the market could tend to undercut consumer confidence in all limousines, and thereby decrease overall limousine sales. On the other hand, "When consumer confidence in a market is increased, consumers enter the market or are willing to purchase more." Areeda & Hovenkamp at P 2230b. Because the economic impact of safety standards is not immediately discernable, something more than a cursory *per se* analysis is required to determine whether the restraint was unreasonable.

The Seventh Circuit recognized these principles in *Moore v. Boating Indus. Ass'n.*, 819 F.2d 693 (7th Cir.1987). There, an association of boat trailer manufacturers was concerned that a boat trailer lamp manufacturer's products did not meet federal safety standards. *Id.* at 700-02. After the association received tests from an independent laboratory indicating that the lamps indeed failed to meet federal standards, the association decided it could no longer certify boat trailers that used the non-complying lamps. *Id.* at 702. The lamp manufacturer filed suit claiming that the association violated antitrust laws by engaging in a group boycott with the purpose of eliminating competition in trailer lights. *Id.* The Seventh Circuit held that plaintiffs claim should have been analyzed under the rule of reason. *Id.* at 710. First, the Court found that there was not a horizontal group boycott, as the boat trailer manufacturers and the boat trailer lamp manufacturers were not competitors. *Id.* at 700. Second, the Court found that per se analysis was inappropriate because the anticompetitive affects of the restraint were not immediately apparent. *Id.* at 710-11. The Court stated, To promote compliance with the [National Traffic and Motor Vehicle Safety Act] and the standards under it, admittedly the purpose of defendants in their compliance program, is not an activity which is "characteristically . . . likely to result in predominantly anticompetitive effects," [*Northwest Wholesale Stationers, Inc., v. Pacific Stationary & Printing Co.*,] 472

U.S. at 296, 105 S.Ct. 2613. There is no justification, therefore, for applying a per se analysis to such activity. *Id.*

Admittedly, the case at bar presents a closer question than *Moore*. Many of the limousine manufacturers with whom Ford allegedly conspired were direct competitors of Craftsmen. In addition, there is no evidence that Craftsmen's products failed to meet federal safety standards at the time defendants allegedly pressured the trade publications to exclude non-QVM products. Nevertheless, the record reveals that the National Highway Traffic Safety Administration encouraged Ford to develop product safety testing, because it was concerned that many coachbuilders were either ignorant of or not abiding by the Federal Motor Vehicle Safety Standards. Ford responded to the call. It spent millions of dollars researching and developing base vehicles, and it determined how to convert those vehicles in compliance with federal safety standards. Through its QVM program, Ford made all coachbuilders aware of the federal safety standards and taught all coachbuilders how to comply with them. Ford disseminated the engineering designs, instruction manuals and test data it developed to QVM and non-QVM coachbuilders alike.[15]

Ford also may have had profit-making motives in mind when it created the QVM standards and allegedly pressured the trade publications not to advertise non-QVM vehicles. However, the fact remains that safety concerns were arguably a motivating factor behind Ford's actions. On this point, we find it significant that the trade magazines did not exclude *all*

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[15] The dissent makes the case for why Ford's safety concerns were a pretext for anti-competitive behavior. However, it ignores countervailing evidence that the Federal Government encouraged Ford to develop testing to ensure that converted limousines complied with federal safety standards. The evidence presented at trial created a legitimate fact dispute that the jury should have analyzed under the rule of reason rather than the *per se* rule, which presumes that Ford's motives and the effect of its actions were anti-competitive.

non-QVM products; *Limousine & Chauffeured Magazine* allowed non-QVM coachbuilders to advertise upon submission of independent crash-testing data, and *Limousine Digest* allowed non-QVM advertisements so long as the coachbuilder certified, through "some independent means," that its vehicles met federal safety regulations. (Tr. 1185.) We acknowledge that the National Highway Traffic Safety Administration did not require Craftsmen to crash-test its vehicles to prove they were safe. However, the fact that at least one of the trade publications required Craftsmen to take measures beyond what the National Highway Traffic Safety Administration required does not convince us that the per se rule should be applied. Whether the crash-testing requirement was disproportionate to the harm it sought to remedy is a question that is appropriately analyzed under the rule of reason. *See State Oil Co.*, 522 U.S. at 10, 118 S.Ct. 275 (when applying the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect").

At this juncture, we cannot and need not determine whether defendants' alleged restraint actually had procompetitive effects. As the Supreme Court held in *California Dental Ass'n v. FTC*, 526 U.S. 756, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999), when determining whether to apply the rule of reason analysis to non-price advertising restrictions related to product safety, the issue is not whether the restrictions were procompetitive, but whether they *could be*. *Id.* at 778, 119 S.Ct. 1604 ("[The plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated."). *See also* Areeda & Hovenkamp at P 1911b (stating that courts must consider the *plausibility* of procompetitive effects when determining which mode of

analysis to apply). Because the alleged restraints were arguably based, at least in part, on safety concerns, they may have had some procompetitive effects. It follows that an abbreviated per se analysis was inappropriate. *See California Dental*, 526 U.S. at 770-781, 119 S.Ct. 1604 (holding that a "quick look" analysis was inappropriate for restrictions imposed by professional association of dentists on member advertising where the likelihood of noncompetitive effects of restrictions were not obvious, and restrictions could plausibly be thought to have procompetitive effect on competition).

C. Whether the Testimony of David Cole Satisfied the Requirements for the Admissibility of Expert Testimony.

The Court of Appeals reviews the district court's decision regarding the admissibility of expert witness testimony for an abuse of discretion. *White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir.2002).

Federal Rule of Evidence 702 governs the admission of expert testimony. The rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, or experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A district court has great latitude in determining whether expert testimony meets the reliability requisites of Rule 702. In making that determination, the district court is free to evaluate one or all of the following factors: (1) whether the theory or technique can be or has been tested; (2) whether the

theory or technique has been subjected to peer review and publication; (3) whether the theory or technique has a known or potential error rate and standards controlling the technique's operation; and (4) whether the theory or technique is generally accepted in the scientific community. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (stating that "many factors will bear on the inquiry" and that the above-listed factors do not constitute "a definitive checklist or test"). *See Blue Dane Simmental Corp. v. American Simmental Ass'n*, 178 F.3d 1035, 1039-1040 (8th Cir.1999) (applying *Daubert* analysis to expert witness testimony in an antitrust case).

We agree with the district court that Craftsmen's expert, David Cole, had sufficient education and experience to testify as an expert regarding plaintiffs' damages. However, Cole's testimony did not sufficiently aid the jury in determining whether there was an "unreasonable" restraint on trade in violation of the Sherman Act. Cole *assumed* that Craftsmen's alleged lost growth from 1995 through 1998 was caused by defendants' alleged conspiracy. He did not determine whether other factors, including the emergence of two direct competitors, may have affected Craftsmen's growth rate. Under the rule of reason analysis, which should have been applied in this case, such an analysis was required. Because Cole's expert opinion failed to "incorporate all aspects of the economic reality," *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir.2000), it should not have been admitted.[16]

III. CONCLUSION

For the foregoing reasons, the district court's damages award is vacated, and the case is remanded for a new trial on Craftsmen's Sherman Act claim.

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[16] We are not foreclosing the possibility Cole can testify at a new trial. We agree he is qualified. He will have to formulate a new opinion using the proper standard under a rule of reason analysis.

LAY, *Circuit Judge*, dissenting.

It would be hard to imagine a more clearly expressed boycott and resulting restraint on trade than in this case, where these actions were, extraordinarily, documented by the Defendants.[17] It would also be hard to imagine a restraint with a more pernicious anticompetitive effect, as it effectively forced Craftsmen to join either the QVM or CMC programs or cease advertising its product. Reflecting on these undisputed facts, the district court applied the per se rule, evidently deciding that the advertising restraint "facially appears to be one that would always or almost always tend to restrict competition."[18] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979). The majority now remands for application of the rule of reason on the basis that the restraint "could be" procompetitive and that safety concerns were "arguably" a motivating factor behind Ford's actions. I submit that the evidence does not support these "safety concerns" arguments, and respectfully dissent.

The Per Se Rule

The majority is correct to note that the rule of reason is the prevailing standard for analyzing a restraint's effect upon competition. However, the *per se* rule is not entirely obsolete. Both the Supreme Court and other circuit courts continue to

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[17] The boycott agreement and resulting advertising restriction were documented in: 1) the April 30, 1996, LIMO minutes that set out the boycott agreement (J.A. 02091-92); 2) the May 6, 1996, letter from LIMO to the magazine that threatened the boycott (J.A. 02093-94); and 3) the May 9, 1996, fax from the president of LIMO to his fellow members congratulating them on the magazine's change of policy to ban advertisements of non-QVM/CMC coachbuilders (J.A. 02085).

[18] The district court decided the parties' motions for and against application of the *per se* rule from the bench at the close of the Plaintiffs evidence and did not give a rationale for why application of that rule was appropriate. (Tr. 1431-32.)

identify the per se rule as the accepted method of analysis for restraints that are obviously anticompetitive. *See State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) ("Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*."); *see also InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 158-59 (3d Cir.2003); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1058 (8th Cir.2000).

The instant case appears to meet all of the characteristics of a typical *per se* case as described in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 294, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985):

> Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle. In these cases, the boycott often cut[s] off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

Id. (citations and quotations omitted). In this case, Ford was irritated by the existence of small coachbuilders who were exploiting the profitable market for extra-long limousines. The existence of these small coachbuilders threatened Ford's

QVM program because it essentially penalized QVM coachbuilders, who were prohibited from building extra-long limousines because of QVM restrictions. Consequently, Ford acted in concert with LIMO to quash this competition by using their combined influence to cut off all national advertising resources to these small coachbuilders.[19] In light of this bold and undisguised anticompetitive behavior, I believe this case fits into that category of "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality-they are 'illegal *per se*.'"[20] *Nat'l Soc'y Prof'l Eng'rs v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

Safety Concerns

I am not persuaded that Ford's supposed "safety concerns" remove this case from the purview of the *per se* rule. The evidence simply does not support that Ford was motivated by safety concerns. The majority stresses that Ford spent

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[19] I submit that there should be little doubt as to the existence of a horizontal agreement between the Defendants. Ford, a member of LIMO, had obviously involved itself in the manufacturing of limousines. Furthermore, the majority was correct to identify the existence of a conspiracy among the Defendants. I would only add that in addition to the evidence highlighted by the majority, the following evidence also supports that Ford influenced LIMO's agenda and spearheaded the boycott effort: 1) Ford encouraged the formation of LIMO around the time QVM began (Tr. 275); 2) Ford lobbied to keep non-QVM members out of LIMO (Tr. 289-90); 3) Ford voiced its opposition to allowing QVM members to advertise in trade journals that allowed non-QVM members to advertise (Tr. 347); 4) the magazines themselves seemed to be receiving similar pressure directly from Ford (Tr. 332-35); and 5) Ford pressured LIMO coachbuilders to make them keep non-QVM members out of LIMO because "[Ford] felt it was better coming from [LIMO] as an organization." (Tr. 282.)

[20] Neither Defendant advocated, or discussed, the application of the "quick look" standard, and it is not appropriate in any event because, in my view, the restraint is obviously anticompetitive.

"millions of dollars" to develop the QVM program to establish safety standards for the manufacture of limousines. However, Ford's own internal documents demonstrate that the motivation behind the program was not safety, but to "ensure that Ford would retain its competitive advantage over Cadillac and further improve the image of [the] Lincoln Town Car" and "produce incremental sales and profits to Ford and its dealers." (J.A. 02213-16.)

The manner in which Ford implemented the program reinforces the idea that Ford was interested in market control and profits, not safety. Coachbuilder Marsha Tortora testified that from 1990 to 1997, Ford never once tested any of her limousines to confirm that she was following QVM guidelines or building safe limousines. (Tr. 274.) This would suggest that Ford was not as concerned with the safety of the end-product as it was with enrolling coachbuilders into the program to ensure that the builders were buying and converting its Lincoln Town Cars.

The idea that Ford was concerned with safety is further undermined by the fact that Ford took a very strong stand against allowing a non-QVM coachbuilder, Vinnie Bergman, into LIMO, even though he could show compliance with federal safety standards through separate testing. Bergman, owner of Ultra Coach, wanted to join LIMO. (Tr. 290.) Although he stretched Lincoln Town Cars, he did not join the QVM program, presumably because he stretched the cars 180 inches, outside the QVM program parameters. (Tr. 289.) Bergman, however, proved his 180-inch stretches were compliant with federal safety standards, using an independent crash test study, which cost him $250,000. (Tr. 291.) Despite the fact that Bergman had proven compliance with federal safety standards, Ford pressured LIMO members to keep him out of the trade group. (Tr. 290.)

Despite this evidence, the majority insists that Ford's "safety concerns" take this case outside the scope of the per

se rule. The majority relies principally on two cases to support its position. First, it cites *Moore v. Boaring Industry Ass'ns.*, 819 F.2d 693 (7th Cir.1987), for the principle that the promotion of federal safety standards is not something that is likely to be anticompetitive, and therefore application of *per se* analysis is inappropriate. *Id.* at 710-11. The critical distinction between this case and *Moore*, however, is the absence of evidence that Craftsmen's limousines were unsafe or failed to meet federal safety standards. There was also no suggestion in *Moore* that "safety concerns" were merely a subterfuge for the desire for greater market control and profits, as is true in the instant case. Indeed, none of the conspirators in the *Moore* boycott were direct competitors of the plaintiff-manufacturer, whereas here, both of the Defendants stood to gain from Craftsmen's demise.

Second, the majority cites *California Dental Ass'n v. FTC*, 526 U.S. 756, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999), stating that "the issue is not whether the restrictions *were* procompetitive, but whether they *could be*. I respectfully submit, however, that *California Dental* cannot be read to support such a sweeping proposition. The relevant language of the case actually reads, "the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* a 778, 119 S.C. 1604. It is not sufficient under *California Dental* to recognize, as the majority does, only that "safety concerns were arguably a motivating factor behind Ford's actions." Instead, a court must determine whether it is "plausible" that the procompetitive effects of the restraint outweigh, or at least equal, the anticompetitive effects. I respectfully submit this understanding of the case is compelled by the fact that the Court speaks of the restraint at issue in that case as plausibly having a "*net* procompetitive effect," *id.* at 771, 119 S.Ct. 1604 (emphasis added), and not

a "*net* anticompetitive effect," *id.* at 774, 119 S.Ct. 1604 (emphasis added), suggesting that a court is required to weigh the competing effects when deciding which method of analysis to apply.

In other words, application of the rule of reason is not warranted simply because the restraint "could be" procompetitive, based on the Defendants' "arguable" motivations. If this were the case, the *per se* rule would hereafter be extinct, as inventive lawyers could always create a procompetitive justification for their clients' monopolistic behavior. Instead, the procompetitive effects of a restraint must plausibly outweigh, or at least equal, the anticompetitive effects in order to move the case to rule of reason review.

Here, the procompetitive safety rationale is not plausible at all, and I submit the majority's fixation on these doubtful "safety concerns" is particularly inappropriate in light of the anticompetitive effect of the restriction on competition. Again, there is no evidence that Craftsmen's limousines were unsafe or failed to meet federal safety standards. Furthermore, as discussed above, the evidence suggests that Ford was not motivated by safety, but was interested only in extinguishing small companies that were taking advantage of the market for extra-long limousines, a market outside the control of Ford's QVM program. The majority fmds significance in the fact that the restriction allowed advertisements of non-QVM coachbuilders who proved compliance with federal safety standards through separate testing, but this fact has little significance. I do not see how placing this burdensome testing requirement on small coachbuilders who already appear to be in compliance with federal safety standards, but who cannot afford to conduct expensive testing, is procompetitive. Finally, in contrast to these suspect safety claims, the anticompetitive effects of the restriction are overwhelming and undeniable, as it basically eliminated Craftsmen's ability

to nationally advertise and promote its limousines. Accordingly, I would affirm the district court.

From my examination of the record, I fail to understand how any jury, under any method of analysis, could find for the Defendants in this case. The very purpose of the *per se* rule is to streamline antitrust analysis by making conclusive presumptions about restrictions that are obviously unreasonable. I respectfully submit that by remanding this case to be retried on the basis of this dubious safety rationale, the majority wastes time and judicial resources.

The anticompetitive effects of this restriction are so clear and pernicious, and the procompetitive effects of the restriction are so questionable and attenuated, that I submit the *per se* rule is the appropriate method of analysis in this case. I also suggest that the majority's proposed application of the rule of reason to any restraint that arguably "could be" procompetitive is a misinterpretation of *California Dental*, and an expansion of the rule of reason analysis.